

THE CONSTITUTIONALITY OF PORNOGRAPHY

LETETIA VAN DER POLL

**Dissertation presented for the Degree of
Doctor of Laws at the University of
Stellenbosch**



PROMOTER: PROF LM DU PLESSIS

CO-PROMOTER: PROF A GOUWS

September 2001

DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and has not previously in its entirety or in part been submitted at any university for a degree.

SUMMARY

The advent of a constitutional democracy in South Africa after the first non-racial democratic elections in 1994 and the subsequent adoption of a final constitution in 1996 introduced a legal order based on “democratic values, social justice and fundamental rights”. The inception of a constitutional democracy in South Africa encourages an assessment of the possible constitutional ramifications of pornography, specifically within a discourse on women’s interests in equality, human dignity and physical integrity. Under the strong influence of United States First Amendment doctrine, pornography is defined (and protected in the “marketplace of ideas”) as a particular mode of expression, thus allowing pornography to be viewed as part of the fabric of an open, free and democratic society. Within this doctrinal context, the recognition and entrenchment of freedom of expression have firmly placed pornography on both the South African constitutional and political agendas.

The objective of this study is to address specific aspects of the debate on *adult heterosexual pornography* (that is, pornography produced for and targeted at the male heterosexual market) in order to establish its constitutionality. This dissertation is not, however, intended as a discourse on pornography as a possible threat to the moral fibre of society, but rather about pornography as an invasion of women’s particular constitutional interests in equality, human dignity as well as security in and control over their bodies.

To this end, Chapter 2 serves to establish a suitable theoretical framework that is capable of facilitating a woman-centred analysis of adult heterosexual pornography within the ambit of the Bill of Rights in the South African Constitution. Consequently, the merit of liberal feminism and radical feminist thought is critically assessed against the particular (constitutional and doctrinal) demands presented by a study of this nature. Chapter three - the first in a trilogy which seeks to evaluate the different conceptualisations of pornography in the United States, Canada and South Africa - critically reflects on the obscenity jurisprudence of the Supreme Court of the United States of America as well as radical feminist campaigns in Minneapolis and Indianapolis to re-

conceptualise pornography and its harm.

Chapter 4 entails a critical reflection on the capacity of Canadian constitutional jurisprudence to address adult heterosexual pornography either as a patriarchal structure which impacts on women's interests in equality, dignity and physical integrity or as a mode of expression which incites gender hatred.

Chapter 5 traces the history of South African censorship law as prelude to a critical discussion of the current Films and Publications Act as well as the first decision of the South African Constitutional Court on the possible human rights implications of sexually explicit material. The chapter concludes with proposals for a suitable conception of the (constitutional) harm as well as a legal definition of adult heterosexual pornography for South African law.

The constitutional implications of the proposed conceptions of pornography and harm are evaluated in Chapter 6 with specific reference to sections 9, 10 and 12 as well as subsection 16(2)(c) of the South African Constitution. Chapter 7 concludes the present study with some thoughts on the suitability of censorship as legal and political strategy.

OPSOMMING

Die koms van 'n konstitusionele demokrasie in Suid-Afrika ná die eerste nie-rassige demokratiese verkiesings in 1994 en die daaropvolgende aanname van 'n finale grondwet in 1996 het 'n regsorde wat op "demokratiese waardes, maatskaplike geregtigheid en basiese menseregte" gegrond is, ingelei. Die aanvang van 'n konstitusionele demokrasie in Suid-Afrika moedig inderwaarheid 'n evaluering van die moontlike grondwetlike gevolge van pornografie, spesifiek binne 'n diskoers oor vroue se belange in gelykheid, menswaardigheid en fisiese integriteit, aan. Onder die sterk invloed van die leerstelling van die Amerikaanse Eerste Amendement word pornografie gedefinieer (en beskerm binne die "markplein van idees") as 'n spesifieke vorm van uitdrukking wat gevolglik meebring dat pornografie noodwendig as deel van 'n oop, vrye en demokratiese gemeenskap beskou word. Binne hierdie dogmatiese konteks het die erkenning en verskansing van vryheid van uitdrukking pornografie stewig op sowel die Suid-Afrikaanse grondwetlike as politieke agendas geplaas.

Die oogmerk van hierdie studie is om spesifieke aspekte rondom die debat oor *volwasse heteroseksuele pornografie* (naamlik, pornografie geproduseer vir en gerig op die manlike heteroseksuele mark) aan te spreek ten einde die grondwetlikheid daarvan te bepaal. Hierdie proefskrif is egter nie bedoel as 'n diskoers oor pornografie as moontlike bedreiging vir die morele stoffasie van die gemeenskap nie, maar eerder oor pornografie as 'n 'n inbreukmaking op vroue se spesifieke grondwetlike belange in gelykheid, menswaardigheid asook sekerheid in en beheer oor hulle liggame.

Gevolglik dien Hoofstuk 2 om 'n gepaste teoretiese raamwerk daar te stel wat oor die vermoë beskik om 'n vroue-gesentreerde analise van volwasse heteroseksuele pornografie binne die raamwerk van die Handves van Menseregte in die Suid-Afrikaanse Grondwet aan te help. Daarom word die meriete van die liberale feminisme en die radikale feministiese denke krities oorweeg teenoor die spesifieke (grondwetlike en dogmatiese) uitdagings wat deur 'n studie van hierdie aard gestel word. Hoofstuk 3 - die eerste in 'n trilogie wat ten doel het om die

verskillende opvattinge oor pornografie in die Verenigde State, Kanada en Suid-Afrika te ondersoek - bevat 'n kritiese oorweging van die Amerikaanse Hooggeregshof se beskouing van obseniteit asook die radikaal feministies-geïnspireerde veldtogte in Minneapolis en Indianapolis wat ten doel gehad het om pornografie en sy nadeel te herkonseptualiseer.

Hoofstuk 4 behels 'n kritiese oorweging van die vermoë van die Kanadese grondwetlike reg om volwasse heteroseksuele pornografie of as 'n patriargale struktuur wat 'n impak op vroue se belange in gelykheid, menswaardigheid en fisiese integriteit het of as 'n vorm van uitdrukking wat geslagshaat aanwakker, aan te spreek.

Hoofstuk 5 speur die geskiedenis van sensuur in Suid-Afrika na as inleiding tot 'n kritiese bespreking van die huidige Wet op Films en Publikasies asook die eerste beslissing van die Suid-Afrikaanse Grondwetlike Hof oor die menseregte-implikasies van seksueel eksplisiete materiaal. Die hoofstuk sluit af met voorstelle vir 'n gepaste begrip van sowel die (grondwetlike) nadeel as 'n regsdefinisie van volwasse heteroseksuele pornografie vir die Suid-Afrikaanse reg.

Die grondwetlike implikasies van die voorgestelde begrippe van pornografie en gepaardgaande nadeel word in Hoofstuk 6 opgewees met besondere verwysing na artikels 9, 10 en 12 asook subartikel 16(2)(c) van die Suid-Afrikaanse Grondwet. Hoofstuk 7 sluit die onderhawige studie af met enkele gedagtes oor sensuur as gepaste regs- en politiese strategie.

DEDICATION

This dissertation is dedicated to my father *Hendrik J van der Poll* (1928 -) for his love, support and care over many years and the memory of my mother *Sanetta HD van der Poll* (née *Dreyer*) (1933 - 1983).

ACKNOWLEDGMENTS

I would first and foremost like to express my sincere appreciation to Prof Lourens M du Plessis and Prof Amanda Gouws of the University of Stellenbosch for their willingness to act as promoter and co-promoter respectively and without whose expert guidance and support this dissertation would not have come to fruition.

I must also thank my colleagues and friends at the Faculty of Law, University of the Western Cape for their encouragement and support. In particular, I would like to thank Ms Lynn Thomas and Ms Hazel Jeftha who graciously allowed me to use their office printers to produce this dissertation in its final form.

Members of the Faculty of Law at the University of Toronto - where I conducted much of the research towards this dissertation - deserve individual mention. Especially the Dean, Prof Ron Daniels, the Assistant Dean in charge of visitors, Prof Catherine Valke, and Prof David Beatty (with whom I shared fruitful discussions on Canadian constitutional and equality jurisprudence) and members of the Faculty administration who provided secretarial assistance (and made every effort to include me in the academic and social activities of the Faculty) must be thanked. The staff of the Bora Laskin Law Library, especially Ann Rae and her competent colleagues, also warrant special mention. I am also indebted to Sharon Edgill of the Office of the Assistant Vice-President, Operations and Services who arranged for accommodation during my stay and Mr Wade Young who acted as the property manager of my apartment at 375 Huron Street.

In closing, the financial assistance of the Centre for Science Development (now the National Research Foundation) who awarded a Doctoral Scholarship towards this research is gratefully acknowledged. The opinions expressed in this dissertation and conclusions arrived at are, however, mine and are not necessarily to be attributed to the Centre for Science Development.

TABLE OF CONTENTS

PAGE

PERIODICALS: ABBREVIATIONS

| | |
|----------------------------|-----|
| South African Publications | xxi |
|----------------------------|-----|

CHAPTER 1

INTRODUCTION

| | | |
|---------|--|----|
| 1 1 | INTRODUCTION | 1 |
| 1 2 | OBJECTIVES AND SCOPE OF THIS DISSERTATION | 6 |
| 1 2 1 | Establishing a Theoretical Framework which could facilitate an Analysis of the Constitutionality of Adult Heterosexual Pornography | 7 |
| 1 2 2 | Formulating a Legal Definition of Adult Heterosexual Pornography | 10 |
| 1 2 3 | Identifying Reasonable and Justifiable Limitations on Adult Heterosexual Pornography | 15 |
| 1 2 4 | Formulating Strategies for the Regulation or Prohibition of Adult Heterosexual Pornography | 18 |
| 1 3 | THE INTERPRETATION OF THE CONSTITUTION, THE BILL OF RIGHTS AND FUNDAMENTAL VALUES | 19 |
| 1 3 1 | The Guidelines for Constitutional Interpretation employed by the South African Constitutional Court | 22 |
| 1 3 1 1 | Literal Interpretation | 23 |
| 1 3 1 2 | Purpose-seeking Interpretation | 24 |
| 1 3 1 3 | Generous Interpretation | 25 |
| 1 3 1 4 | Historical Interpretation | 26 |
| 1 3 1 5 | Contextual Interpretation | 28 |
| 1 4 | CONCLUDING OBSERVATIONS | 30 |

CHAPTER 2

THEORETICAL FRAMEWORK

| | | |
|----------------|--|-----------|
| 2 1 | INTRODUCTION | 33 |
| 2 2 | FEMINISM | 35 |
| 2 2 1 | A Brief Overview of the Three Phases of Feminism | 37 |
| 2 3 | LIBERAL FEMINIST THOUGHT | 39 |
| 2 3 1 | The Philosophical Foundation of Liberal Feminism | 39 |
| 2 3 2 | A Critical Assessment of the Theoretical Tenets of Liberal Feminism | 42 |
| 2 3 2 1 | The Liberal Feminist Position on the Role of the Law and the State | 43 |
| 2 3 2 2 | The Liberal Conception of Human Nature | 44 |
| 2 3 2 3 | The Liberal Conception of (Human Reason) | 46 |
| 2 3 3 3 | The Liberal Conception of (Gender) Equality | 48 |
| 2 3 2 5 | The Liberal Distinction Between the Private and Public Sphere | 50 |
| 2 3 3 | The Suitability of Liberal Feminism as Theoretical Framework in Formulating a Constitutional Response to Adult Heterosexual Pornography | 51 |
| 2 4 | RADICAL FEMINIST THOUGHT | 54 |
| 2 4 1 | The Radical Feminist Theory of Patriarchy | 57 |
| 2 4 2 | The Radical Feminist Structures of Patriarchy | 61 |
| 2 4 2 1 | The State as Patriarchal Structure | 61 |
| 2 4 2 2 | Patriarchy, Sexuality and Sexual Violence | 62 |
| 2 4 2 3 | Sexuality, Patriarchal Violence and Pornography | 64 |
| 2 4 3 | An Assessment of the Suitability of Radical Feminism as Theoretical Framework in Formulating a Constitutional Response to Adult Heterosexual Pornography | 68 |
| 2 5 | CONCLUDING OBSERVATIONS | 71 |

CHAPTER 3

HARMLESS EXPRESSION OR A VIOLATION OF CIVIL RIGHTS? A CRITICAL EVALUATION OF THE DIFFERENT CONCEPTIONS OF PORNOGRAPHY IN UNITED STATES CONSTITUTIONAL JURISPRUDENCE

| | | |
|---------|---|-----|
| 3 1 | INTRODUCTION | 73 |
| 3 2 | PORNOGRAPHY UNDER COMMON LAW | 75 |
| 3 2 1 | The Facts in <i>Regina v Hicklin</i> | 76 |
| 3 2 2 | The Opinion of the Court of Queen's Bench | 77 |
| 3 3 | OBSCENITY AND THE FIRST AMENDMENT: UNITED STATES SUPREME COURT JURISPRUDENCE | 80 |
| 3 3 1 | The Facts in <i>Roth v United States</i> | 80 |
| 3 3 2 | The Decision of the Supreme Court | 81 |
| 3 3 3 | The Supreme Court's Definition of Obscenity | 83 |
| 3 3 4 | A Period of Legal Uncertainty: United States Supreme Court Obscenity Jurisprudence between 1957 and 1973 | 85 |
| 3 3 5 | The Facts in <i>Miller v California</i> | 88 |
| 3 3 6 | The Opinion of the Supreme Court | 88 |
| 3 4 | A CRITICAL ASSESSMENT OF THE CONCEPTION OF PORNOGRAPHY EMPLOYED BY THE UNITED STATES SUPREME COURT | 91 |
| 3 4 1 | Employing a Liberal Paradigm: The Modern Doctrine of Free Speech | 95 |
| 3 4 2 | The Supreme Court's Philosophical Justification for the Constitutional Protection of Freedom of Expression | 96 |
| 3 4 3 | The Possible Constitutional Consequences of an Instrumental Justification of Freedom of Expression in relation to Pornography | 100 |
| 3 4 4 | The Supreme Court's Conception of Harm and the Standard of Obscenity in <i>Miller v California</i> | 103 |
| 3 4 4 1 | "(a) whether the <i>average person</i> , applying <i>contemporary community standards</i> would find that the work, taken as a whole, appeals to the <i>prurient interest</i> " | 105 |
| 3 4 4 2 | "(b) whether the work depicts or describes, in a <i>patently offensive</i> way, sexual conduct <i>specifically defined by the applicable state law</i> " | 108 |

| | | |
|-----------|---|-----|
| 3 4 4 3 | “(c) whether the work, taken as a whole, lacks <i>serious</i> literary, artistic, political, or scientific value” | 109 |
| 3 4 5 | To Summarise | 111 |
| 3 5 | RADICAL FEMINIST INITIATIVES IN RESPONSE TO THE CONCEPT OF PORNOGRAPHY EMPLOYED BY THE UNITED STATES SUPREME COURT | 113 |
| 3 5 1 | A Tale of Two Cities: The Anti-Pornography Ordinances for Minneapolis and Indianapolis | 114 |
| 3 5 1 1 | The City of Minneapolis: From Zoning Restrictions to a Civil Rights Violation | 114 |
| 3 5 1 2 | The Dynamics of the Civil Rights Ordinance for Minneapolis | 116 |
| 3 5 1 2 1 | Pornography as Subordination | 117 |
| 3 5 1 2 2 | Pornography as a Form of Sex Discrimination | 118 |
| 3 5 1 2 3 | Pornography as a Cause of Sex Discrimination | 119 |
| 3 5 1 3 | The Passage and Fate of the Anti-Pornography Ordinance for Minneapolis | 120 |
| 3 5 1 4 | The Anti-Pornography Ordinance for Indianapolis: <i>American Booksellers Association Inc v William Hudnut</i> | 122 |
| 3 6 | RESPONDING TO THE RADICAL FEMINIST CONCEPTION OF PORNOGRAPHY: THE PROPOSALS OF SUNSTEIN AND DOWNS | 128 |
| 3 6 1 | Finding a Golden Mean Between Prurience and the Constitutional Interests of Women: The Problem of Violent Pornography | 129 |
| 3 6 2 | A Critical Assessment of Sunstein and Downs’ Proposals for Legal Reform | 131 |
| 3 7 | CONCLUDING OBSERVATIONS | 133 |

CHAPTER 4**PORNOGRAPHY AS UNDUE EXPLOITATION OF SEX OR WILFUL PROMOTION OF (GENDER) HATRED: A CRITICAL ASSESSMENT OF THE CONSTITUTIONAL JURISPRUDENCE OF THE SUPREME COURT OF CANADA**

| | | |
|--------------|--|-----|
| 4 1 | INTRODUCTION | 135 |
| 4 2 | A HISTORICAL OVERVIEW OF CANADIAN OBSCENITY JURISPRUDENCE | 137 |
| 4 2 1 | The Adoption of a Statutory Definition | 137 |
| 4 2 2 | The Juridical Meaning of "Undue Exploitation of Sex" | 140 |
| 4 2 3 | The First Statutory Attempt to Reform Obscenity Law in Canada | 148 |
| 4 2 4 | Bill C-54: A Second Attempt at Statutory Reform | 152 |
| 4 3 | PORNOGRAPHY, COMMUNITY TOLERANCE AND HARM DEFINED: THE JURISPRUDENCE OF THE SUPREME COURT OF CANADA | 154 |
| 4 3 1 | The Facts in <i>Regina v Butler</i> | 155 |
| 4 3 2 | The Decision of the Supreme Court | 156 |
| 4 3 3 | The First Constitutional Question: Does Section 163 Violate Section 2(b) of the Canadian Charter? | 160 |
| 4 3 4 | The Second Constitutional Question: Is Section 163 Justified Under Section 1 of the Canadian Charter? | 161 |
| 4 3 4 1 | The Functions of and Foundation Test for Section 1 of the Canadian Charter | 162 |
| 4 3 4 2 | Is Section 163 a Limit Prescribed by Law? | 163 |
| 4 3 4 3 | Pressing and Substantial Objectives | 163 |
| 4 3 4 4 | Proportionality | 168 |
| 4 3 4 4 1 | Rational Connection | 169 |
| 4 3 4 4 2 | Minimal Impairment | 171 |
| 4 3 4 4 3 | Balancing the Effects with the Legislative Objective | |
| 4 3 5 | A Critical Evaluation of the Supreme Court's Conception of Pornography and Harm in <i>Regina v Butler</i> | 172 |

| | | |
|------------|--|------------|
| 4 4 | PORNOGRAPHY AS THE WILFUL PROMOTION OF HATRED? A CRITICAL ASSESSMENT OF THE CANADIAN SUPREME COURT'S APPROACH TO HATE PROPAGANDA | 178 |
| 4 4 1 | Hate Propaganda and Freedom of Expression: <i>Regina v Keegstra</i> | 179 |
| 4 4 2 | The Facts in <i>Regina v Keegstra</i> | 180 |
| 4 4 3 | The Decision of the Supreme Court | 181 |
| 4 4 4 | The Supreme Court's Analysis under Section 2(b) of the Canadian Charter | 182 |
| 4 4 5 | The Supreme Court's Analysis under Section 1 of the Canadian Charter | 183 |
| 4 4 5 1 | Pressing and Substantial Objectives | 184 |
| 4 4 5 2 | Proportionality | 185 |
| 4 4 6 | A Critical Assessment of the Approach of the Supreme Court of Canada on Hate Propaganda in <i>Regina v Keegstra</i> | 187 |
| 4 4 7 | The Possible Value of the Canadian Approach to Hate Propaganda in respect of Adult Heterosexual Pornography and the South African Constitution | 191 |
| 4 5 | CONCLUDING OBSERVATIONS | 194 |

CHAPTER 5

TOWARD A LEGAL DEFINITION OF ADULT HETEROSEXUAL PORNOGRAPHY AND A CONCEPTION OF HARM FOR SOUTH AFRICAN CONSTITUTIONAL JURISPRUDENCE

| | | |
|------------|---|------------|
| 5 1 | INTRODUCTION | 195 |
| 5 2 | A HISTORICAL OVERVIEW OF PORNOGRAPHY UNDER SOUTH AFRICAN LAW | 196 |
| 5 2 1 | The Position under Common Law and Pre-Union South African Law | 196 |
| 5 2 2 | South African Obscenity Law after 1910 | 200 |
| 5 2 3 | The Publications and Entertainments Act of 1963 | 203 |
| 5 2 4 | The Stand-off between the Publications Control Board and Public Opinion | 209 |
| 5 2 5 | The Kruger Commission Report and the New Publications Act of 1974 | 210 |

| | | |
|----------------|--|-----|
| 5 3 | TOWARDS A NEW STATUTORY LANDSCAPE FOR THE REGULATION OF FILMS AND PUBLICATIONS IN SOUTH AFRICAN LAW | 216 |
| 5 3 1 | The Drafting of a New Films and Publications Bill for South Africa | 216 |
| 5 3 2 | A Southern African Perspective on Incitement to Hatred | 220 |
| 5 3 3 | The New Films and Publications Act of 1996 | 230 |
| 5 3 3 1 | A New System of Classification | 231 |
| 5 3 3 2 | The Impact of the Films and Publications Act | 233 |
| 5 3 3 3 | The Criminalisation of Hate Speech in South Africa's Age of Constitutionalism | 234 |
| 5 4 | THE CONSTITUTIONAL IMPLICATIONS OF INDECENCY, OBSCENITY AND OFFENSIVENESS: <i>CASE; CURTIS V MINISTER OF SAFETY AND SECURITY</i> | 236 |
| 5 4 1 | The Facts in <i>Case; Curtis v Minister of Safety and Security</i> | 236 |
| 5 4 2 | The Decision of the South African Constitutional Court | 237 |
| 5 4 3 | A Critical Assessment of the Decision of the South African Constitutional Court in <i>Case; Curtis v Minister of Safety and Security</i> | 243 |
| 5 4 3 1 | The Right to Privacy as Constitutional Priority | 244 |
| 5 4 3 2 | The Constitutional Court's Conception of Pornography | 246 |
| 5 4 3 3 | Traces of Ambivalence in the Constitutional Court's Assessment of Pornography | 247 |
| 5 5 | A SUITABLE CONCEPTION OF HARM AND LEGAL DEFINITION OF ADULT HETEROSEXUAL PORNOGRAPHY FOR SOUTH AFRICAN (CONSTITUTIONAL) LAW | 248 |
| 5 5 1 | A Suitable Conception of Harm of Adult Heterosexual Pornography | 248 |
| 5 5 2 | A Legal Definition of Adult Heterosexual Pornography for South African Law | 249 |
| 5 6 | CONCLUDING OBSERVATIONS | 253 |

CHAPTER 6**REASONABLE AND JUSTIFIABLE LIMITATIONS ON ADULT
HETEROSEXUAL PORNOGRAPHY WITHIN THE AMBIT OF THE BILL OF
RIGHTS IN THE SOUTH AFRICAN CONSTITUTION**

| | | |
|------------------|--|------------|
| 6 1 | INTRODUCTION | 255 |
| 6 2 | THE PRIMARY AND ALTERNATIVE CONSTITUTIONAL ARGUMENTS AGAINST PORNOGRAPHY: A PATRIARCHAL PRACTICE OR A HATEFUL AND DEGRADING MODE OF EXPRESSION? | 257 |
| 6 3 | THE PRIMARY CONSTITUTIONAL ARGUMENT: ADULT HETERO- SEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE | 257 |
| 6 4 | ADULT HETEROSEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE AND THE RIGHT TO EQUALITY AS FUNDAMENTAL CONSTITUTIONAL VALUE AND IDEAL | 258 |
| 6 4 1 | The South African Constitutional Court's Conception of Equality | 258 |
| 6 4 2 | The South African Constitutional Court's Analysis of the Right to Equality | 262 |
| 6 4 2 1 | The Three States of Enquiry | 264 |
| 6 4 2 2 | The Relationship between Differentiation and the (General) Limitation Clause of the South African Constitution | 267 |
| 6 4 2 3 | "Mere Differentiation" and the Relationship between Sections 9(1) and 9(3) of the South African Constitution | 269 |
| 6 4 2 4 | Discrimination Defined: "Fair" and "Unfair" Discrimination and the centrality of Human Dignity | 270 |
| 6 4 2 5 | The Expressly Enumerated and Analogous Grounds of Differentiation and the Matter of Direct and Indirect Discrimination | 275 |
| 6 4 3 | Adult Heterosexual Pornography and the Rights to Equality and Human Dignity: Unfair Discrimination on the Basis of Sex? | 280 |
| 6 4 3 1 | The First Stage of the Enquiry: An Assessment in terms of Section 9(1) of the South African Constitution | 280 |
| 6 4 3 2 | Does Adult Heterosexual Pornography Differentiate between People or Cate- gories of People? | 281 |
| 6 4 3 1 2 | Does the Differentiation Bear a Rational Connection to a Legitimate (State) Purpose? | 283 |

xvii

| | | |
|-----------|--|-----|
| 6 4 3 2 | The Second Stage of the Enquiry: An Assessment of Adult Heterosexual Pornography in terms of Section 9(3) of the South African Constitution | 284 |
| 6 4 3 2 1 | Does the Differentiation Amount to "Discrimination"? | 285 |
| 6 4 3 2 2 | If the Differentiation Amounts to "Discrimination", Does It Constitute "Unfair Discrimination"? | 286 |
| 6 4 3 3 | The Final Stage of the Enquiry: Can Adult Heterosexual Pornography as Patriarchal Practice be Justified under Section 36 of the South African Constitution? | 293 |
| 6 4 4 | To Summarise | 295 |
| 6 5 | ADULT HETEROSEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE AND THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON | 296 |
| 6 5 1 | The Right to Freedom of the Person: Freedom from Violence, Torture and Cruel, Inhuman and Degrading Treatment | 297 |
| 6 5 2 | The Right to Security of the Person: Security in and Control over One's Body | 301 |
| 6 5 3 | Adult Heterosexual Pornography: The Gender-specific Violence and Abuse Revealed | 302 |
| 6 5 4 | Adult Heterosexual Pornography and its Role in a Culture of Gender-specific Sexual Violence and Abuse | 306 |
| 6 6 | THE ALTERNATIVE CONSTITUTIONAL ARGUMENT: ADULT HETEROSEXUAL PORNOGRAPHY AS THE ADVOCACY OF HATRED BASED ON GENDER THAT CONSTITUTES INCITEMENT TO CAUSE HARM | 311 |
| 6 6 1 | The Philosophical Justification of Freedom of Expression as Fundamental Constitutional Right | 312 |
| 6 6 2 | Expression Specifically Excluded: The Structure, Contents and Requirements of Section 16(2) of the South African Constitution | 314 |
| 6 6 3 | Conceptualising the Advocacy of Hatred | 315 |
| 6 6 4 | Adult Heterosexual Pornography as the Advocacy of Hatred that Constitutes Incitement to Cause Harm | 317 |
| 6 6 5 | The Relationship between Section 16(2) and Section 36 of the South African Constitution | 319 |
| 6 7 | CONCLUDING OBSERVATIONS | 321 |

CHAPTER 7**CONCLUSIONS AND RECOMMENDATIONS**

| | | |
|--------------|---|-----|
| 7 1 | INTRODUCTION | 323 |
| 7 2 | PORNOGRAPHY IN SOUTH AFRICA'S AGE OF CONSTITUTIONALISM | 324 |
| 7 2 1 | The Foundational Requirement: A Suitable Theoretical Framework | 324 |
| 7 2 2 | The American Experience: An Obsession with Speech, Prurience and Mere Images | 329 |
| 7 2 3 | The Canadian Alternative | 336 |
| 7 2 4 | A Suitable Conception of Harm and Legal Definition of Adult Heterosexual Pornography for South African Law | 339 |
| 7 2 5 | Pornography and the South African Constitution: A Violation of Equality, Human Dignity and Physical Integrity? | 347 |
| 7 3 | SOME THOUGHTS ON THE REGULATION AND/OR PROHIBITION OF ADULT HETEROSEXUAL PORNOGRAPHY AS LEGAL AND POLITICAL STRATEGY | 355 |
| 7 4 | CONCLUDING OBSERVATIONS | 361 |

SELECTED BIBLIOGRAPHY

| | |
|--------------------|-------|
| BOOKS | xxii |
| PERIODICALS | xxvii |

TABLE OF CASES

| | |
|--------------------------------|---------|
| South Africa | xxxv |
| Foreign Jurisdictions | |
| Canada | xxxviii |
| European Court of Human Rights | xl |
| India | xl |
| Namibia | xli |
| United Kingdom | xli |
| United States of America | xli |
| Zimbabwe | xlvi |
| Amici Curiae Briefs | |

| | |
|---------------|------|
| United States | xlvi |
| Canada | xlvi |
| South Africa | xlvi |

TABLE OF STATUTES

Constitutions and/or Human Rights Charters

| | |
|-------------------------------------|------|
| State Constitutions | xlvi |
| International Human Rights Charters | xlvi |
| Regional Human Rights Charters | xlvi |

Statutes

| | |
|--------------|------|
| South Africa | xlvi |
|--------------|------|

Foreign Jurisdictions

| | |
|--------------------------|----|
| Bobhuthatswana | i |
| Canada | i |
| Namibia | i |
| Transkei | i |
| United Kingdom | i |
| United States of America | i |
| Venda | li |
| Zimbabwe | li |

COMMISSION REPORTS

| | |
|--------------|-----|
| South Africa | lii |
|--------------|-----|

Foreign Jurisdictions

| | |
|--------------------------|-----|
| Australia | lii |
| Canada | lii |
| Denmark | lii |
| New Zealand | lii |
| United Kingdom | lii |
| United States of America | lii |

| | |
|-------------|-----|
| CONFERENCES | liv |
|-------------|-----|

| | |
|---------------------|-----|
| LEGISLATIVE REPORTS | liv |
|---------------------|-----|

| | |
|-----------------------|-----|
| OFFICIAL PUBLICATIONS | liv |
|-----------------------|-----|

xx

| | |
|--|------------|
| PARLIAMENTARY DEBATES | liv |
| RESEARCH GROUPS | lv |
| TASK FORCES / GROUPS | lv |
| WORKING GROUPS | lv |
| NEWSPAPER / MEDIA REPORTS AND MAGAZINES | lvi |

PERIODICALS: ABBREVIATIONS

THE FOLLOWING STANDARD ABBREVIATIONS ARE USED IN RESPECT OF SOUTHERN AFRICAN PUBLICATIONS

(THE TITLES OF FOREIGN PUBLICATIONS HAVE NOT BEEN ABBREVIATED)

| | |
|-----------------------|--|
| CILSA | Comparative and International Law Journal of South Africa |
| DJ | De Jure |
| JJS / TRS | Journal for Juridical Science / Tydskrif vir Regswetenskap |
| LAWSA | Law of South Africa |
| Lesotho LJ | Lesotho Law Journal |
| SAJHR | South African Journal of Human Rights |
| SALJ | South African Law Journal |
| SAPL / PR | South African Public Law / Suid-Afrikaanse Publiekreg |
| Social Justice | Social Justice: A Journal of Crime, Conflict and World Order |
| Stell LR | Stellenbosch Law Review |
| THRHR | Tydskrif vir Hedendaagse Romeins Hollandse Reg |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg |

CHAPTER 1

INTRODUCTION

| | | PAGE |
|---------|---|------|
| 1 1 | INTRODUCTION | 1 |
| 1 2 | OBJECTIVES AND SCOPE OF THIS DISSERTATION | 6 |
| 1 2 1 | Establishing a Theoretical Framework which could facilitate an Analysis of the Constitutionality of Adult Heterosexual Pornography | 7 |
| 1 2 2 | Formulating a Legal Definition of Adult Heterosexual Pornography | 10 |
| 1 2 3 | Identifying Reasonable and Justifiable Limitations on Adult Heterosexual Pornography | 15 |
| 1 2 4 | Formulating Strategies for the Regulation of and Drawing a Conclusion about the Constitutional Implications of Adult Heterosexual Pornography | 18 |
| 1 3 | THE INTERPRETATION OF THE CONSTITUTION, THE BILL OF RIGHTS AND FUNDAMENTAL VALUES | 19 |
| 1 3 1 | The Guidelines for Constitutional Interpretation employed by the South African Constitutional Court | 22 |
| 1 3 1 1 | Literal Interpretation | 23 |
| 1 3 1 2 | Purpose-seeking Interpretation | 24 |
| 1 3 1 3 | Generous Interpretation | 25 |
| 1 3 1 4 | Historical Interpretation | 26 |
| 1 3 1 5 | Contextual Interpretation | 28 |
| 1 4 | CONCLUDING OBSERVATIONS | 30 |

CHAPTER 1

INTRODUCTION

"If [pornography] were being done to human beings, it would be reckoned an atrocity. It is being done to women. It is reckoned fun, pleasure, entertainment, sex ..."¹

"In pornography [there is], in one place, all of the abuses that women had to struggle so long to even begin to articulate ... the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively."²

1.1 INTRODUCTION

The advent of a constitutional democracy in South Africa after the first non-racial democratic elections in 1994 and the subsequent adoption of a final constitution in 1996³, introduced a legal order based on "democratic values, social justice and fundamental human rights".⁴ The first paragraph of the Preamble to the Interim Constitution⁵ expressed the "need to create a new order ... in a sovereign and democratic constitutional state in which there is *equality between men and women* and people of all races so that all citizens shall be able to exercise their fundamental

¹ Andrea Dworkin "Against the Male Flood: Censorship, Pornography, and Equality" in P Smith (ed) *Feminist Jurisprudence* (1993) 449 at 455. See also 1985 8 *Harvard Women's Law Journal* 1 at 11 and C Itzin (ed) *Pornography: Women, Violence and Civil Liberties* (1992) 515 at 523 (hereinafter referred to as *Pornography*).

² Catharine MacKinnon "Francis Biddle's Sister: Pornography, Civil Rights, and Speech" in *Feminism Unmodified: Discourses on Life and Law* (1987) 163 at 171 (hereinafter referred to as *Feminism Unmodified*). See also 1985 *Harvard Civil Rights - Civil Liberties Law Review* 1 at 16 - 17 and C Itzin (ed) *Pornography* 456 at 461 (*supra*).

³ The text of the Constitution of the Republic of South Africa, Act 108 of 1996, was adopted by the Constitutional Assembly on May 8, 1996 and certified by the Constitutional Court in *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) and *Certification of the Amended Text of the Final Constitution* 1997 (1) BCLR (CC). It entered into force on 4 February 1997 and is hereinafter referred to as the South African Constitution (popularly known as the Final Constitution; to be distinguished from The Constitution of the Republic of South Africa, Act 200 of 1993 or the Interim Constitution).

⁴ See the Preamble to Act 108 of 1996 (*supra*).

⁵ Act 200 of 1993. The Interim Constitution - which was the result of a lengthy and difficult process of negotiation - entered into force on April 27, 1994.

rights and freedoms".⁶ The Interim Constitution incorporated - in spite of its transitory status - both the idea of constitutionalism (which seeks to limit the power of government) and the principles of constitutional supremacy⁷ and justiciability.⁸ The basic features of and constitutional ideals expressed in both these constitutions signal a fundamental departure from, *inter alia*, a racially-qualified constitutional order, the doctrine of parliamentary sovereignty and the Westminster parliamentary and electoral system. In particular, these events also signal a radical departure from an oppressive system of censorship intended to impose the Calvinist puritanism and political ideology of the ruling (white) minority on an entire society. Few would contest that the former constitutional order and its system of statutory censorship⁹ was hardly conceived in a spirit of liberty and democracy, or argue that it was premised upon a desire to promote equality between men and women.

Consequent upon the inception of a constitutional democracy, courts are called upon to interpret and enforce the South African Constitution - which contains a justiciable Bill of Rights¹⁰ - as the supreme law of the Republic.¹¹ Certain sections of the Constitution¹² and the Bill of Rights¹³ are

⁶ My emphasis. A similar reference to gender equality has, however, been excluded from the Preamble to Act 108 of 1996 (*supra*).

⁷ On the significance of this, see n 11 (*infra*).

⁸ On the significance of this, see n 10 (*infra*).

⁹ See, for example, the Indecent or Obscene Photographic Matter Act 37 of 1967, the Sexual Offences Act 23 of 1957, the Liquor Act 27 of 1989 and the now repealed Publications Act 42 of 1974. These statutory measures prohibited the possession of indecent or obscene photographic matter, certain forms of expression in public (such as striptease dancing and sex-related public entertainment) and "undesirable" material if deemed to be indecent or obscene or harmful or offensive to public morals. The constitutionality of section 2(1) of Act 37 of 1967 (*supra*) was successfully challenged under sections 13 and 15 of the Interim Constitution which entrenched the rights to privacy and freedom of speech and expression respectively: see *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (CC). These statutory measures as well as this decision of the Constitutional Court will be fully considered in Chapter 5 of this dissertation (*infra*).

¹⁰ The Bill of Rights is set out in Chapter 2 of the South African Constitution. It applies to all law and binds the legislature, executive, judiciary and all organs of state: see section 8(1) of Act 108 of 1996 (*supra*).

¹¹ The principle of constitutional supremacy means that Parliament is subject in all respects to the provisions of the Constitution, that all laws have to be made in accordance with the Constitution and that Parliament has only the powers vested in it by the Constitution: see *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) at 1317 - 1318. The supremacy of the South African Constitution is recognised in its Founding Provisions. Section 2 of Act 108 of 1996 (*supra*) reads:

entrenched with the result that amendments thereof require a special majority.¹⁴ The Constitution itself describes the Bill of Rights as a “cornerstone of democracy in South Africa,”¹⁵ a phrase which has on occasion been interpreted to mean that the rights contained therein are placed beyond the influence of, and are accordingly not dependent on, the political and electoral process.¹⁶ For the first time in South Africa’s history, freedom of expression together with a variety of other rights have been entrenched as fundamental constitutional rights.¹⁷ The recognition of freedom of expression as a basic right in section 16 of the South African Constitution¹⁸ is an acknowledgement of the role that free expression plays in the process of

“Supremacy of Constitution

This Constitution is the supreme law of the Republic; any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

See also section 237 of Act 108 of 1996 (*supra*) which emphasises that “all constitutional obligations must be performed diligently and without delay”.

¹² Section 1 of Act 108 of 1996 (*supra*) is a specific example of an entrenched provision of the South African Constitution. Section 74(1) provides that section 1 may be amended by a Bill passed by the National Assembly with a supporting vote of at least 75% of its members and the National Council of Provinces with a supporting vote of at least 6 provinces. The same proviso applies to section 74(1) itself. See also par 1 2 n 33 (*infra*).

¹³ Section 74(2) of Act 108 of 1996 (*supra*) provides that Chapter 2 of the South African Constitution may be amended by a Bill passed by the National Assembly with a supporting vote of at least two thirds of its members and the National Council of Provinces with a supporting vote of at least 6 provinces.

¹⁴ The South African Constitutional Court has indicated that radical amendments to the Constitution which affects its most basic features may not be valid: see *Premier of KwaZulu-Natal v President of the Republic of South Africa* 1995 (12) BCLR 1561 (CC) at 1576, quoting from a judgment of the Supreme Court of India, *Indira Nehru Gandhi v Raj Narain* (1975) AIR SC 2299 at 2461. According to the Indian Supreme Court, the supremacy of the constitution, the rule of law, the principle of equality and judicial review constitute the basic features of a constitution which cannot be amended.

¹⁵ See section 7(1) of Act 108 of 1996 (*supra*).

¹⁶ See *West Virginia State Board of Education v Barnett* 319 US 624 (1943) at 638, cited with approval in *S v Makwanyane* 1995 (6) BCLR 665 (CC).

¹⁷ See section 15 of Act 200 of 1993 (*supra*) and section 16 of Act 108 of 1996 (*supra*) respectively.

¹⁸ Section 16 of Act 108 of 1996 (*supra*) reads:

“Freedom of expression

16 (1) Everyone has the right to freedom of expression, which includes -

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

building a democratic social, political and legal order based on fundamental human rights. Freedom of expression is believed to be the basis of many, if not all, human rights.¹⁹ Yet no constitutional right is absolute and boundaries are set by the competing rights of individuals and legitimate state interests.²⁰ Therefore, it is commonplace in all legal systems that, although the boundaries of free expression may vary from one society to another and from one area of expression to another, the right to freedom of expression is not absolute. In the case of the South African Constitution, section 16 also contains *internal* restrictions which proscribe “propaganda for war,”²¹ “incitement of imminent violence”²² or the “advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.”²³

Under the strong influence of United States First Amendment doctrine, pornography is popularly defined (and protected in the “marketplace of ideas”)²⁴ as a particular mode of speech and

-
- 16 (2) The right in subsection (1) does not extend to -
 (a) propaganda for war;
 (b) incitement of imminent violence; or
 (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

¹⁹ Comparative jurisprudence widely supports this view. See, for example, *Mandela v Falati* 1994 (4) BCLR 1 (W) at 8 *per* Van Schalkwyk J: “In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech”; *India Express Newspaper (Bombay) Pvt Ltd v Union of India* [1985] 2 SCR 287 at 320: “Indeed, freedom of expression is the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succour and protection to other liberties”; *Palko v Connecticut* 302 US 319 at 327: freedom of speech is “the matrix, the indispensable condition of nearly every other form of freedom”; *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Limited* [1987] 33 DLR (4th) 174 at 183: “Representative democracy ... is in great part the product of free expression”.

²⁰ See Gerhard Erasmus “Limitation and Suspension” in D van Wyk et al *Rights and Constitutionalism: the New South African Legal Order* (1996) 629 at 639 (hereinafter referred to as *Rights and Constitutionalism*).

²¹ See section 16(2)(a) of Act 108 of 1996 (*supra*).

²² See section 16(2)(b) of Act 108 of 1996 (*supra*).

²³ See section 16(2)(c) of Act 108 of 1996 (*supra*). The possible ramifications of this section will be considered in Chapter 6 of this dissertation (*infra*). See also par 1 2 3 (*infra*).

²⁴ The “quest for the truth” or “marketplace of ideas” paradigm has been presented to explain the rationale behind the wide recognition of freedom of expression as a fundamental right. It has to a large extent emanated from John Stuart Mill’s *On Liberty* (first published in 1851) and forms the basis of United States First Amendment jurisprudence. The relevant section of the First Amendment to the Constitution of the United States of America (added to the

expression, thus allowing pornography to be viewed as part of the fabric of an open, free and democratic society. The values which free expression is typically seen to underpin in an open and democratic society centre around the encouragement of political debate and promotion of personal self-fulfilment and autonomy. Within this doctrinal context, the recognition and entrenchment of freedom of expression has firmly placed pornography on both the South African constitutional and political agendas.²⁵

The pornography issue is arguably one of the oldest and most ardently debated controversies.²⁶ The debate incorporates complex political, legal and moral arguments, resulting in the demarcation of sharply delineated battle lines. The social revolution of the 1960s saw the rise of the women's liberation movement²⁷ which sparked renewed interest in the pornography issue among American feminist scholars. This social revolution was the driving force in the reinterpretation of the concept of (women's) rights in a decidedly political context, and the feminist challenge to pornography²⁸ must be viewed against this backdrop.

This chapter gives an exposition of the objectives and scope of the present study as well as of the issues that will be addressed in future chapters and the conclusions that are anticipated.²⁹ The chapter also includes *general* observations on the interpretation of the South African

Constitution in 1791) reads: "Congress shall make no law ... abridging the freedom of speech, or of the press". Mill suggested that society is most likely to discover truth, not only in science but about the best conditions for human advancement as well, if it tolerates a free marketplace of ideas. Mill's rather optimistic ideas about the conditions most favourable for the discovery of truth were, however, rejected in the *Report by the British Committee on Obscenity and Film Censorship* (1979) (London: Cmnd 7772 HMSO).

²⁵ Since the inception of the Interim Constitution the pornography issue has resurfaced in South Africa with new impetus in political debate in general and in constitutional and feminist jurisprudence in particular.

²⁶ Dorothy McBride-Stetson notes that pornography is at least as old as prostitution, or at least as old as literate prostitutes: see "Sexuality" in *Women's Rights in the USA: Political Debates and Gender Roles* (1991) at 211.

²⁷ The 1960s America also saw the rise of the "hippie" culture, student protest, the Vietnam War, the Black Consciousness movement and an awareness of the rights of gay and lesbian and other interest groups. These events called for a reinterpretation of the concepts of freedom and equality and thus became the driving force behind American judicial activism.

²⁸ On the significance of this, see, in particular, Chapter 2 and Chapter 3 of this dissertation (*infra*).

²⁹ See, in particular, par 1 2 and accompanying footnotes (*infra*).

Constitution, in particular the Bill of Rights and fundamental constitutional values.³⁰

1 2 OBJECTIVES AND SCOPE OF THIS DISSERTATION

The objective of this dissertation will be to address specific aspects of the debate on *adult heterosexual pornography*³¹ in order to establish its *constitutionality*. The dissertation is not intended as a discourse on pornography as a possible threat to the moral fibre of society, but about pornography as an invasion of women's constitutional rights and freedoms instead.³² Its objective will thus be to formulate a legal response which does not assume a gender-neutral stance on pornography. One of the unique features of the South African Constitution and Bill of Rights is that it embodies fundamental values that can be used to help guide the process of constitutional interpretation in general and, for that reason, an analysis of the constitutional implications of pornography in particular. Human dignity, equality and freedom are recognised as fundamental constitutional values in sections 1(a), 7(1), 9, 10, 36(1) and 39(1)(a) of the South African Constitution. Section 1(a)³³ expressly states that the Republic of South Africa is a sovereign democratic state founded on the values of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." The interpretation of the Bill of Rights (under section 39(1)(a))³⁴ and the limitation of rights (under section 36(1)) must both take place in accordance with what is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." South African courts in general and the Constitutional Court in particular agree on the importance of similar value declarations in the

³⁰ See par 1 3 and accompanying footnotes (*infra*).

³¹ The term adult heterosexual pornography will be employed in this dissertation to refer to pornography targeted at the *male heterosexual market*; to be distinguished, therefore, from gay, lesbian and child pornography. I restrict my study to adult heterosexual pornography because, unlike for example child pornography which elicits outright condemnation without fail, pornography produced for - and targeted at - the male heterosexual market is often thought to bear no constitutional repercussions. Consequently, adult heterosexual pornography is usually perceived as a mere nuisance to be tolerated in - and thus an unavoidable consequence of - a free and open democratic society.

³² See par 1 2 3 (*infra*).

³³ Section 1 (which forms part of the Founding Provisions of Act 108 of 1996 (*supra*)) affords a centrality to human dignity which it lacks in the Interim Constitution. This extension probably takes its cue from article 1(2) of the German Basic Law: see Lourens du Plessis and Amanda Gouws "The Gender Implications of the Final Constitution (with particular reference to the bill of rights)" 1996 11 *SAPL/PR* 472 at 473.

³⁴ See par 1 3 and accompanying footnotes (*infra*).

Interim Constitution.³⁵ It is, accordingly, anticipated that these three values - together with the guidelines for constitutional interpretation developed by the South African Constitutional Court³⁶ - will form an integral part of the present study. In what follows, I shall provide a preliminary exposition of the objectives of the present study and the conclusions that follow.

1 2 1 Establishing a Theoretical Framework which could facilitate an Analysis of the Constitutionality of Adult Heterosexual Pornography

The purpose of Chapter 2 of this dissertation is to establish a theoretical framework to explain the effects of pornography to argue for a legal solution that upholds a constitutional interest in equality, human dignity and freedom.³⁷ Such a theoretical framework must realise two objectives. First, it must be capable of conceptualising pornography as an invasion of women's rights rather than as a threat to the moral convictions of society. This will enable South African

³⁵ See, for example, *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) at 78 - 81; *S v Makwanyane* at 754 and 675 - 676 (*supra*); *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC) at 1403 - 1404 *per* Sachs J: "The values that must suffuse the whole process [of constitutional adjudication] are derived from the concept of an open and democratic society based on freedom and equality".

³⁶ A general discussion of these guidelines for interpretation follows in par 1 3 and accompanying footnotes (*infra*).

³⁷ The rights to equality and human dignity which are entrenched in section 9 and section 10 of Act 108 of 1996 (*supra*) respectively read:

"Equality"

- 9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Section 10 of Act 108 of 1996 (*supra*) reads:

"Human dignity"

10 Everyone has inherent dignity and the right to have their dignity respected and protected."

courts to consider a legal definition of pornography not principally based on the libertarian idea³⁸ of the free expression of ideas, but on notions sensitive to the possible interrelationship between pornography and women's (sexual) identity, autonomy and status. This could - in turn - enable South African courts to consider the concept of harm related to pornography within the context of the constitutional interests of women. This strategy represents a move away from a traditional libertarian (moralistic and individual centred) analysis of the problem and places the constitutionality of pornography directly at issue. Secondly, a perception of pornography as a patriarchal practice or system (rather than as an abstract expression of ideas) could provide courts with the opportunity to develop legally sustainable arguments against pornography with the purpose of actively promoting the achievement of (substantive) equality for women.³⁹

In view of the fact that the feminist movements of the twentieth century⁴⁰ advocated revolutionary changes to the status of women in society⁴¹ and sought to investigate the foundation

³⁸ There are, of course, diverse trains of liberal thought and the one that I am critical of could be described as libertarian which, in step with Robert Nozick's political philosophy, stresses the individual's inviolable and exhaustive right to life, liberty and property which can never be overridden by any other consideration, be it social equality, public utility or communal justice. See also my discussion of liberal legal and political thinking as prelude to a critical assessment of liberal feminism in Chapter 2 of this dissertation par 2 3, especially par 2 3 1 and accompanying footnotes (*infra*).

³⁹ Substantive equality requires due consideration of the *actual social and economic conditions* which cause inequality between individuals and groups. Since this form of equality is concerned with institutionalized, structural differences in equality, it takes note of actual social and economic disparities between individuals and groups in society. Unlike formal equality that tends to reinforce and entrench inequalities, substantive equality seeks to *eliminate* inequalities. To this effect it may be necessary in the present study to follow a broad and inclusive contextual approach to constitutional interpretation. An understanding of the constitutional context surrounding the South African Constitution might be vital to the interpretation of the constitutional implications of pornography, for to discuss pornography without analysing South Africa's constitutional history and the power relations within which the debate is situated would be similar to analysing the phenomenon of migrant workers without referring to the political ideology of apartheid. Therefore, the socio-political context of pornography will be explored fully in Chapter 6 of this dissertation (*infra*). See also par 1 2 3 (*infra*).

⁴⁰ The women's movements of the twentieth century found expression in two waves of feminism. Whereas the first wave drew to a close by 1920, the second commenced in 1960 and continues to the present: see Sandra Kemp and Judith Squires "Introduction" in S Kemp and J Squires (eds) *Feminisms* (1997) 3.

⁴¹ See Leslie Bender "A Lawyer's Primer on Feminist Theory and Tort" 1998 30 *Journal of Legal Education* 3 at 5 - 6.

of women's (legal) oppression,⁴² feminist thought appears ideally suited to furnish the desired framework. But due to the diverse nature of feminism and the multiplicity of feminist accounts of women's subordination, a broad and general feminist critique of pornography will clearly not realise the objectives of the present study. Chapter 2 of this dissertation must, therefore, rise to the challenge of establishing a specific feminist discourse (or discourses) that can be utilised to establish an analytical framework for an assessment of the constitutional implications of adult heterosexual pornography.

By virtue of the fact that the popular paradigm within which pornography is assessed in Anglo-American legal systems (especially in the United States and Canada), the merit of liberal feminism as possible theoretical framework will have to be evaluated. It will, however, be shown in Chapter 2 that liberal feminism is not able to provide a comprehensive critique of adult heterosexual pornography⁴³ and that a more inclusive feminist framework will therefore have to be sought. To this end, radical feminist thought will be assessed. By upholding a constitutional interest in pornography, radical feminist thought strikingly illustrates why equality, human dignity and freedom - not only as individual rights but also as fundamental democratic constitutional principles - could justify a reasonable limitation on adult heterosexual pornography. It might well follow that a radical feminist approach - with its rejection of a moralistic analysis of pornography and its sensitivity to objectification, dehumanisation and sexual violence against women - is ideally suited to the task. The postmodern feminist critique of radical feminism, emanating from the latter's essentialist stance on the notion of a common women's experience, will also receive due consideration.

Chapter 2 will conclude with a brief exposition of the core theoretical/feminist arguments against adult heterosexual pornography and these arguments will serve as the basis of the specific constitutional arguments that will be considered in Chapter 6 of this dissertation.⁴⁴

⁴² For a comprehensive exposition of the foundations of women's legal subordination, see Katharine Bartlett "Foundations of Women's Legal Subordination" in KT Bartlett (ed) *Gender and Law: Theory, Doctrine, Commentary* (1993) 1.

⁴³ Only one liberal feminist argument against pornography will be explored in the present study, namely that a certain category of pornographic material constitutes so-called hate speech which can reasonably and justifiably be prohibited in terms of section 16(2)(c) of Act 108 of 1996 (*supra*). See also par 1 2 3 (*infra*) and Chapter 2 of this dissertation par 2 3 3 and accompanying footnotes (*infra*).

⁴⁴ See par 1 2 3 (*infra*).

1 2 2 Formulating a Legal Definition of Adult Heterosexual Pornography

In order to formulate a legal definition of pornography, a comparative analysis of the constitutional jurisprudence of the United States of America, Canada and South Africa will be conducted in three consecutive chapters.

In Chapter 3 the philosophical foundations of the First Amendment to the United States Constitution will be considered as a prelude to the obscenity jurisprudence of the United States Supreme Court. As suggested above,⁴⁵ First Amendment jurisprudence is an obvious point of reference in Anglo-American legal systems on the issues of individual autonomy, privacy and freedom of expression. Moreover, the radical feminist critique of pornography (which produced two draft anti-pornography ordinances)⁴⁶ was formulated in direct response to the moralistic and individual centred obscenity jurisprudence of the Supreme Court articulated in *Roth v United States*⁴⁷ and *Miller v California*.⁴⁸ Consequently, the radical feminist critique of First Amendment obscenity jurisprudence can only be fully understood when viewed in this particular context.

Under the Constitution of the United States - which has no general limitation clause⁴⁹ - the question whether pornography is justifiable has to be dealt with as part of the broader question of the meaning of the right(s) in question. The absence of a general limitation clause has led the Supreme Court to adopt a narrow interpretation of rights with a view to identify acceptable limitations and this has - in the case of pornography - produced an artificial conceptualization of (constitutionally) protected "speech" and unprotected "non-speech." The various reasons why the obscenity jurisprudence of the Supreme Court could be viewed as unsatisfactory will be considered in Chapter 3. The Supreme Court's philosophical stance could give rise to a freedom-equality and/or dignity dilemma - a dilemma that results if the (all-encompassing) individual freedom to produce, sell or consume pornography is weighed against the rights of women (and

⁴⁵ See par 1 1 (*supra*).

⁴⁶ For more on the passage and eventual fate of these two ordinances, see n 53 - n 56 (*infra*).

⁴⁷ 354 US 476 (1957).

⁴⁸ 413 US 15 (1973).

⁴⁹ A limitation clause is general when it "applies in the same way to all the rights in the Bill of Rights": see "Limitation" in J de Waal et al *The Bill of Rights Handbook* (2000) 140 at 142 (hereinafter referred to as *Handbook*).

other historically marginalised or vulnerable groups) to equality and human dignity.⁵⁰ It could, accordingly, be argued that (gender) equality is incompatible with a definition of individual freedom that perpetuates the sexual subordination and domination of women.⁵¹ The conception of harm employed in United States law may also be problematic. This could, in part, be because the classical free speech theory - to which the United States Supreme Court subscribes - seems incapable of either appreciating (or responding to) the concept and the reality of the *social* harm of pornography (resulting from the sexual subordination and objectification of women) for this theory remains premised upon the view that free speech and expression promotes the “quest for the truth” and, in the interest of neutrality, reserves a place for pornography in the “marketplace of ideas.”⁵² The classical free speech theory thus fails to even *consider* whether pornography might objectify women or whether it might impact upon their citizenship status.

In response to United States Supreme Court jurisprudence, Andrea Dworkin and Catharine MacKinnon drafted two civil rights ordinances for the city councils of Minneapolis⁵³ and Indianapolis⁵⁴ respectively. It will be constructive to consider both the historical backdrop to as well as the eventual fate of these two ordinances. Although the Minneapolis ordinance was vetoed twice⁵⁵ and the Indianapolis ordinance was declared a violation of First Amendment rights,⁵⁶ these ordinances provide useful conceptualisations of pornography and its perceived harm to women, particularly when viewed in the South African context where women have for

⁵⁰ See, in general, MacKinnon in *Feminism Unmodified* 163 at 166 (*supra*). The recognition of the values of freedom and equality in a constitution will produce instances in which the demands of equality may limit absolute individual liberty and cases where the requirements of freedom may check the pursuit of equality. This dilemma might be satisfactorily addressed if a broad contextual approach to constitutional interpretation is followed. On what constitutes a contextual interpretation, see par 1 3, especially par 1 3 1 5 (*infra*).

⁵¹ See par 1 2 3 (*infra*) and also Chapter 6 of this dissertation (*infra*).

⁵² On the significance of this, see par 1 1 n 24 (*supra*).

⁵³ See Chapters 139 and 141 of the Minneapolis Code of Ordinances Relating to Civil Rights of 1984. See also Chapter 3 of this dissertation par 3 5 1 1 and par 3 5 1 2 and accompanying footnotes (*infra*).

⁵⁴ See Section 16-1(a)(2) of the Indianapolis City-County General Ordinance 24 and 35 of 1984. See also Chapter 3 of this dissertation par 3 5 1 4 and accompanying footnotes (*infra*).

⁵⁵ The Minneapolis ordinance did not withstand the veto of progressive liberal mayor Donald Fraser. See also Chapter 3 of this dissertation par 3 5 1 3 and accompanying footnotes (*infra*).

⁵⁶ See *American Bookseller's Association v Hudnut* 771 F2d 323 7th Cir (1985). See also Chapter 3 of this dissertation par 3 5 1 4 and accompanying footnotes (*infra*).

long been disempowered socially and politically⁵⁷ due to a history of sexism, discrimination and violence. Moreover, the Dworkin/MacKinnon conception of pornography enquires whether pornography contributes toward *de facto* gender inequality and sexual violence, both of which exist as entrenched and widespread social problems in South African society.⁵⁸ Seen in this context, mainstream United States jurisprudence may struggle to provide an adequate analytical framework for the understanding of pornography under entrenched and widespread conditions of gender inequality.

The respective proposals of Cass Sunstein and Donald Alexander Downs in response to the radical feminist conception of pornography form an important part of the quest for a legal definition in Anglo-American jurisprudence and will, accordingly, receive due consideration in Chapter 3.

In Chapter 4 the constitutional jurisprudence of the Supreme Court of Canada will be considered in order to establish whether the Canadian approach to pornography constitutes an alternative preferable to mainstream United States First Amendment doctrine. It could be argued on the basis of the harm-based analysis employed by the Canadian Supreme Court in *Regina v Butler*⁵⁹ that the court's context-based and equality-sensitive approach yielded a more satisfactory analysis of the constitutional ramifications of adult heterosexual pornography than United States First

57

On the issue of women's social and political status in South Africa, Joanne Fedler argues that the images of women published in, for example, *Hustler* magazine may simply be a reflection of the broader social context, a reflection of the dominant social representation of women. She points out that rape - which is one of the most pervasive crimes in South Africa - is often the subject of jokes in *Hustler* magazine (as is sexual harassment and femicide): see "A Feminist Critique of Pornography" in J Duncan (ed) *Between Speech and Silence: Hate Speech, Pornography and the new South Africa* (1996) 45 at 51 (hereinafter referred to as *Between Speech and Silence*). These contentions will be considered in full in Chapter 6 of this dissertation (*infra*). On the subject of the content of jokes and cartoons published in *Hustler* and *Penthouse*, see in general Russell *Against Pornography: The Evidence of Harm* (1993) (Berkeley: Russell Publications).

58

For a discussion on gender oppression and the problem of violence against women in South Africa in particular, see Lloyd Vogelmann and Gillian Eagle "Overcoming Endemic Violence against Women" 1991 18(1-2) *Social Justice* 209 - 229; Katharine Wood and Rachel Jewkes "'Love is a dangerous thing': micro-dynamics of violence in sexual relationships of young people in Umtata" April 1998 Medical Research Council: CERSA (Women's Health) (Pretoria) 2 - 46; Naeemah Abrahams et al "'I do not believe in democracy in the home': Men's relationships with and abuse of women" August 1999 MRC: CERSA (Women's Health) (Tygerberg) 1 - 26; and Jewkes et al "'He must give me money, he mustn't beat me': Violence against women in three South African Provinces" August 1999 MRC: CERSA (Women's Health) (Pretoria) 1 - 23.

59

[1992] 1 SCR 452.

Amendment doctrine. The Canadian conception of pornography might, accordingly, provide a useful basis for the formulation of a legal definition of pornography that admits of legal arguments against an unqualified allowance of pornography within the ambit of the South African Constitution.

Chapter 5 will commence with a historical overview of the impact of apartheid ideology and Calvinist conservatism on the approach of the South African judiciary and legislature to the control of sexually explicit material. Before 1994, South African obscenity law was characterised by severely restrictive censorship laws,⁶⁰ designed - in part - with the express objective to impose the Calvinist puritanism of the ruling white minority on society. Obscenity in South Africa under common law and approximately forty years of institutionalised oppression became a political vehicle for the expression of a certain conservative perception of immorality.

When multi-party political negotiations started in the early 1990s in the run up to the first democratic election, it became clear that the South African legal order would enter a radically new phase founded on the idea of a supreme constitution with a justiciable bill of rights. The ensuing fundamental legal and political changes presented the South African courts and legislature with numerous challenges. The first (and to date only) decision of the South African Constitutional Court on the issue of pornography, individual autonomy and freedom of expression will be analysed critically against the background of the country's peculiar political history.⁶¹ It will be argued on the basis of the primary feminist argument to be established in Chapter 2 that pornography should not be understood as a right to privacy issue, but should instead be placed within a constitutional context which is sensitive to the sexually based subordination and abuse that women have suffered (and continue to suffer) within the privacy of their homes *in particular*. It could be argued that the failure to treat pornography as a women's issue but as one of individual liberty premised upon choice instead does not only ignore the constitutional history of South Africa, but also the reality of sexual violence against women. Such a strategy - which the South African Constitutional Court appears to favour - seems to ignore the possible social harm of pornography and could effectively isolate women from state support and recourse to legal remedies. In this context, the response of the South African legislature to the constitutional changes since 1994 - which resulted in the Films and Publications

⁶⁰ See par 11 n 9 (*supra*).

⁶¹ See *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* (*supra*). The present critique will in particular be directed at the observations of Didcott J who delivered the principal judgment of the court. Mokgoro J's treatment of the issue as one of free expression in addition to personal privacy is - for reasons that will be advanced in Chapter 5 (*infra*) - equally unsatisfactory.

Act⁶² - will also be critically assessed in Chapter 5.

The jurisprudential strategies of the Constitutional Court and the legislative strategy of the South African Parliament in respect of pornography are fraught with difficulties. Proposals for legal reform must, therefore, be considered. This will mainly be done in Chapters 3, 4 and 5. It will, accordingly, be argued in Chapter 5 that due to the problems endemic to United States jurisprudence and in light of South Africa's long history of racial segregation and institutionalised oppression, South African law should consider a different route. The constitutional jurisprudence of the Supreme Court of Canada may be of particular value, especially as the Canadian Charter of Rights and Freedoms⁶³ (like the South African Constitution) contains express guarantees such as equality before the law⁶⁴ and provides for reasonable limitations of rights by way of a general limitation clause.⁶⁵

⁶² Act 65 of 1996.

⁶³ The Canadian Charter of Rights and Freedoms Constitution Act of 1982 Part I.

⁶⁴ See section 15 of the Constitution Act of 1982 (*supra*).

⁶⁵ See section 1 of the Constitution Act of 1982 (*supra*). Section 36 of the South African Constitution provides that the limitation of a right is only valid if it meets the requirements of this section. Section 36 of Act 108 of 1996 (*supra*) reads:

"Limitation of rights

- 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

For other examples of general limitation clauses contained in international, regional and state constitutions, see article 29(2) of the Universal Declaration of Human Rights, article 4 of the International Covenant on Economic, Social and Cultural Rights, the limitation clauses in the International Covenant on Civil and Political Rights, article 11(2) of the European Convention on Human Rights, article 19 of the German Basic Law, article 1 of the Canadian Charter of Rights and Freedoms and article 22 of the Constitution of the Republic of Namibia.

1 2 3 Identifying Reasonable and Justifiable Limitations on Adult Heterosexual Pornography

The purpose of Chapter 6 of this dissertation is to identify the various constitutional rights, liberties and values which might be implicated by the issue of adult heterosexual pornography. As pointed out above,⁶⁶ two core legal arguments against pornography will be explored, each emanating from different traditions of feminist thought and finding expression in specific rights and freedoms entrenched in the South African Constitution. In considering the constitutional implications of pornography, not only freedom of expression but at least four other constitutional rights may be implicated. These include the right to equality,⁶⁷ the right to human dignity,⁶⁸ the right to freedom and security of the person⁶⁹ and the right to freedom from servitude.⁷⁰

On the basis of the *primary* theoretical argument against pornography (which conceptualises pornography as a patriarchal practice or a system of subordination),⁷¹ it could be argued that

⁶⁶ See par 1 2 2 (*supra*).

⁶⁷ For the full text of section 9 of Act 108 of 1996 (*supra*), see par 1 2 1 n 37 (*supra*).

⁶⁸ For the full text of section 10 of Act 108 of 1996 (*supra*), see par 1 2 1 n 37 (*supra*).

⁶⁹ Section 12 of Act 108 of 1996 (*supra*) reads:

“Freedom and security of the person

12 (1) Everyone has the right to freedom and security of the person, which includes the right -

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right -

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.”

⁷⁰ Section 13 of Act 108 of 1996 (*supra*) reads:

“Slavery, servitude and forced labour

13 No one may be subjected to slavery, servitude or forced labour.”

⁷¹ See par 1 2 1 (*supra*). Drucilla Cornell’s conception of pornography as violation will also be assessed as part of the primary theoretical (feminist) argument against pornography: see “Sexual Difference, the Feminine, and

pornography implicates women's rights to equality,⁷² human dignity,⁷³ freedom and security of the person⁷⁴ and freedom from servitude.⁷⁵ Constitutional arguments against pornography based on the said rights call for clearly formulated processes and techniques of constitutional interpretation. A technique of interpretation which takes due cognisance of the historical context

Equivalency" in *Transformations: Recollective Imagination and Sexual Difference* (1993) 112 - 146 (hereinafter referred to as *Transformations*). For a concise exposition of Cornell's programme of equivalent rights and conception of pornography, see Karin van Marle "Cornell se argument van equivalent rights en haar bespreking van pornografie" (1996) 11 *SAPR/PL* 574 - 582.

⁷² Under the right to equality it could be argued that pornography differentiates between men and women, thus constituting a violation of section 9(1) which, in turn, constitutes unfair discrimination on the basis of sex under section 9(3) of Act 108 of 1996 (*supra*).

⁷³ Under the right to human dignity it could be argued that pornography dehumanizes all women through the process of objectification, a process which confirms gender stereotypes and gender prejudice, thus impacting on women's social status. In *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) at 743 Kriegler J (dissenting) pointed out that gender stereotyping is both a result and a cause of prejudice. It is a "societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the [South African] Constitution vehemently condemns ... [o]ne of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities." In *Egan v The Queen in the right of Canada; Attorney-General of Quebec* (1995) 29 CRR (2d) 79 at 104 - 105 the court confirmed that equality is incompatible with second-class citizenship treatment. In its view, "[e]quality means that our society cannot tolerate ... that ... certain people [be treated] as second-class citizens, that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity." See also *Miron v Trudel* (1995) 29 CRR (2d) 189 at 205.

⁷⁴ Under the right to freedom and security of the person the role of pornography in creating a culture of rape, sustaining misogyny and sex discrimination and enforcing negative stereotypes about women will have to be assessed. In United States Supreme Court jurisprudence, the word "stereotype" bears its ordinary meaning. In *Mississippi University for Women v Hogan* 458 US 718 (1982) at 725 the court defined "stereotype" as "fixed notions concerning the roles and abilities of males and females". In *Miron v Trudel* at 200 (*supra*) McLachlin J observed that the enumerated and analogous grounds set out in section 15(1) (the equality clause) of the Canadian Charter of Rights and Freedoms serve as indicators of discrimination because "distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics." The above interpretations were cited with approval by the South African Constitutional Court in *President of the Republic of South Africa v Hugo* (*supra*).

⁷⁵ Under the right to freedom from servitude it could be argued that women under patriarchy are in a disempowered state of slavery or servitude.

of the South African Constitution, enhances the Constitution's core values and gives effect to the larger objects of the Constitution, will be required. To this end, the unique features of the South African Constitution as well as the guidelines for constitutional interpretation implemented by the South African Constitutional Court⁷⁶ will be assessed in Chapter 6.

The *alternative* theoretical argument that will be employed against pornography (namely that a particular category of pornographic material constitutes a hateful mode of expression that could reasonably and justifiably be limited)⁷⁷ calls for a consideration of the constitutional boundaries of the right to freedom of expression.⁷⁸ As pointed out above,⁷⁹ United States First Amendment jurisprudence, oddly enough, defines obscene materials as non-speech in order to limit the otherwise all-encompassing right to freedom of speech. It could, however, be argued that - under the provisions of the right to freedom of expression - this artificial conception becomes unnecessary in the South African constitutional context, since the Constitution itself limits a specific provision which gives effect to the principle that freedom of expression is not absolute. Section 16(2)(c) specifically excludes the "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" from constitutional protection.

Within this constitutional context, the argument that some forms of pornography create images of hatred or are violent modes of expression⁸⁰ that constitute a violation of the dignity of women as a class, will be explored. If a definition of pornography under the rubric of free expression is sanctioned, it could be argued that these forms of pornography constitute hate speech (or even "rape speech")⁸¹ that can justifiably be limited in terms of both section 16(2)(c) and section 36

⁷⁶ For a preliminary discussion of the guidelines for constitutional interpretation developed by the South African Constitutional Court, see par 1 3 and accompanying footnotes (*infra*).

⁷⁷ See par 1 2 1 n 43 (*supra*).

⁷⁸ For the full text of section 16 of Act 108 of 1996 (*supra*), see par 1 1 n 18 (*supra*).

⁷⁹ See par 1 2 2 (*supra*).

⁸⁰ Kathleen Mahoney "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" 1992 55(1) *Law and Contemporary Problems* 77 at 91 - 94. Du Plessis and Gouws, among others, argue that the degradation and denigration which women suffer as a result of pornography amount to misogyny, which is a form of hatred: see (1996) 11 *SAPL/PR* 473 at 482 (*supra*).

⁸¹ The term "rape speech" is employed by Steven Childress: see "Reel 'Rape Speech': Violent Pornography and the Politics of Harm" (1991) 25 *Law and Society Review* 177 at 212. The author argues in favour of the retention of the traditional view that the content of speech should not be restricted but for exceptional cases. If the exception is found, it should be limited to speech that

of the South African Constitution.⁸²

The constitutional prohibition of hate speech contained in section 16(2)(c) - like so many other constitutional features⁸³ - is the direct result of South Africa's socio-political history of apartheid. It may, therefore, be argued that viewed within this particular context, the constitutional prohibition primarily targets inflammatory political and racist propaganda. It may consequently prove to be difficult to formulate a persuasive legal argument against pornography that will move South African courts to view certain forms of pornography as hate speech and thus unconstitutional. It will therefore be suggested that the decision of the Supreme Court of Canada in *Regina v Keegstra*⁸⁴ could provide useful guidelines which the South African Constitutional Court may consider⁸⁵ in case of an argument against pornography on these grounds.

On the basis of the constitutional arguments against pornography that are likely to be advanced in Chapter 6, the question whether pornography justifies regulation would have to be considered. The implications of censorship will, accordingly, be examined in Chapter 7 of this dissertation.

1 2 4 Formulating Strategies for the Regulation or Prohibition of Adult Heterosexual Pornography

In Chapter 7 administrative, criminal law and civil law strategies for the regulation of pornography will be considered. Current proposals for the regulation of pornography in South African law will be assessed with due consideration to the measures constituted by the Films and Publications Act.⁸⁶ By virtue of the fact that Chapter 6 will show that adult heterosexual pornography violates various constitutional rights and freedoms of women as a class, it will be argued that criminal law, coupled with a system of administrative control, is in the present instance best suited to censure pornography conceptualised as an unconstitutional practice of subordination.

cause harm.

⁸² See Fedler in J Duncan (ed) *Between Speech and Silence* 45 at 56 (*supra*). A similar view is expressed by Du Plessis and Gouws: see (1996) 11 *SAPL/PR* 472 at 481 n 41 (*supra*).

⁸³ See par 1 1 (*supra*) and par 1 3 (*infra*).

⁸⁴ [1990] 3 SCR 697; (1990) 3 CRR (2d).

⁸⁵ In terms of section 39(1)(c) of Act 108 of 1996 (*supra*), South African courts may consider foreign case law when interpreting the South African Constitution. See also par 1 3 and accompanying footnotes (*infra*).

⁸⁶ See n 62 (*supra*).

It goes without saying that the interpretation of the South African Constitution and Bill of Rights is a pivotal aspect of the present study. It will therefore be imperative to explore the methods or techniques for constitutional interpretation employed by the South African Constitutional Court. To this end, the remainder of the present chapter is devoted to *general* observations on the subject of constitutional interpretation, an exercise which is intended to contextualise the discussion that will follow in Chapter 6 of this dissertation.

13 THE INTERPRETATION OF THE CONSTITUTION⁸⁷, THE BILL OF RIGHTS AND FUNDAMENTAL VALUES

One of the features of the Bill of Rights in the South African Constitution is that the rights and freedoms entrenched therein are formulated in general and abstract terms. In the absence of *specific* internal constitutional directives for interpretation,⁸⁸ it becomes all the more important to understand the rules and principles that apply to the interpretation of a supreme constitution with a justiciable Bill of Rights. Three points about the interpretation of a constitution of this nature justify consideration. First, it must be emphasised that there appears to exist agreement that the interpretation of a supreme constitution differs from the interpretation of ordinary statutes.⁸⁹ Lord Wilberforce on occasion observed that a constitution is *sui generis*,⁹⁰ a view

⁸⁷ Constitutional interpretation entails the "reading, understanding, and application of a Constitution": see Du Plessis and Hugh Corder "Observations on reading and understanding the Chapter on Fundamental Rights as a constitutional instrument" in *Understanding South Africa's Transitional Bill of Rights* (1994) 60 at 72 (hereinafter referred to as *Transitional Bill of Rights*). Constitutional interpretation is therefore concerned with the "process of determining the meaning of a constitutional provision": see "Interpretation of the Bill of Rights" in J De Waal et al *Handbook* 122 (*supra*).

⁸⁸ That is, apart from the Preamble to as well as sections 1, 36, 39 and 57 of Act 108 of 1996 (*supra*).

⁸⁹ See, in particular, Du Plessis and Jacques de Ville "Bill of Rights Interpretation in the South African Context (1): Diagnostic Observations" 1993(a) 4(1) *Stell LR* 63; "Bill of Rights Interpretation in the South African Context (2): Prognostic Observations" 1993(b) 4(2) *Stell LR* 199; "Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects" 1993(c) 4(3) *Stell LR* 356 and Du Plessis "The Bill of Rights in the Working Draft of the New Constitution: An Evaluation of Aspects of a Constitutional Text *Sui Generis*" 1996 1 *Stell LR* 3. See also Froneman J's observations in *Matiso and Others v The Commanding Officer, Port Elizabeth Prison* 1994 (3) BCLR 80 (SE) at 87.

⁹⁰ See *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) at 328.

which the South African Constitutional Court endorses.⁹¹ By contrast the three constitutions⁹² which preceded the Interim Constitution were little different from ordinary Acts of Parliament. They had no supreme status with the result that - apart from a few entrenched sections⁹³ - Parliament was free to amend their provisions by ordinary procedures. The Interim and Final Constitutions both clearly establish a fundamentally different legal and constitutional order to that which previously existed.⁹⁴

A second point which merits consideration is that the South African Constitution itself does not extensively prescribe how it should be interpreted. The instructions pertaining to the interpretation of the South African Constitution contained in, *inter alia*, sections 1, 7, 36, 39, 239 and 240 as well as in Chapter 14 and the Preamble to the Constitution are - on the whole - sufficiently abstract and open-ended as to require interpretation themselves. Section 39(1)(a), by way of illustration, demands an interpretation which “promote[s] the values which underlie an open and democratic society based on human dignity, equality and freedom”. Not only does this instruction stand in need of interpretation itself, but section 39(1)(a) also fails to provide clarity on whether the society referred to ought to be taken as the present South African society or an abstract (or even ideal) one. Section 39(1)(b) states that international law *must* be considered when interpreting the Bill of Rights. International human rights law in general is thus seen as a “tool of interpretation”⁹⁵ which South African courts are compelled to consider in the adjudicative process.⁹⁶ Section 39(1)(c), on the other hand, states that foreign law *may* be

⁹¹ See, for example, *S v Makwanyane* at 678 (*supra*) and *S v Mhlungu* 1995 (7) BCLR 793 (CC) at 799 - 800.

⁹² See the South Africa Act of 1909 (9 Edw VII c9), the Constitution of the Republic of South Africa, Act 32 of 1961 and the Constitution of the Republic of South Africa, Act 110 of 1983.

⁹³ See, for example, sections 35, 137 and 152 of the South Africa Act of 1909 (*supra*). See also *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *Minister of the Interior v Harris* 1952 (4) SA 769 (A) and *Collins v Minister of the Interior* 1957 (1) SA 552 (A) which dealt with the repeal of section 35 (which protected the non-white franchise in the Cape Province) without compliance with the special procedures required by section 152 of the Act.

⁹⁴ Some of the key features of this new order were discussed in par 1.1 and accompanying footnotes (*supra*).

⁹⁵ See *S v Makwanyane* at 686 (*supra*).

⁹⁶ According to John Dugard, logic dictates that section 29(1)(b) does not merely require South African courts to consider treaties to which South Africa is a party, but also international conventions, international custom, the general principles of law recognised by civilised nations and judicial decisions: see “The Role of International Law in Interpreting the Bill of Rights” 1994 101 *SAJHR* 208.

considered. South African courts are not, therefore, under obligation to consider foreign case law as this will “not necessarily offer a safe guide”⁹⁷ to the interpretation of the Constitution. Section 39(2) - although not directly concerned with the interpretation of the Constitution - is, however, fundamental to the application of the Constitution to legislation, common law or customary law and should, therefore, be read with section 8 (the application clause).⁹⁸ Section 39(3) confirms that the Bill of Rights does not deny the existence of rights or freedoms that are “recognised or conferred by common law, customary law or legislation” provided that such rights are not inconsistent with the Bill of Rights.

Section 239 of the South African Constitution contains definitions of “national legislation”,⁹⁹ “organ of state”¹⁰⁰ and “provincial legislation”.¹⁰¹ Section 240 states that in the event of inconsistency between different texts of the Constitution, the English text is authoritative. Some of the General Provisions contained in Chapter 14 of the South African Constitution may also be relevant to the process of interpretation and the Preamble to the Constitution may be used in the interpretation of the substantive provisions of the Bill of Rights. For purposes of interpretation, provisions of the Interim Constitution may also still be of significance. There seems support for the idea that the Postamble - that emphasised the need for national reconciliation - and the Constitutional Principles of the Interim Constitution may still serve as guides to constitutional interpretation.¹⁰²

⁹⁷ *S v Makwanyane* at 687 (*supra*).

⁹⁸ Section 8(1) states that the Bill of Rights applies to all law and binds the legislature, executive, judiciary and all organs of state. See also n 10 (*supra*).

⁹⁹ “National legislation” includes subordinate legislation made in terms of an Act of Parliament and legislation that was in force when the Constitution took effect and that is administered by the national government.

¹⁰⁰ “Organ of state” means any department of state or administration in the national, provincial or local sphere of government, or any other functionary or institution exercising power or performing a function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation (but excluding a court or a judicial officer).

¹⁰¹ “Provincial legislation” includes subordinate legislation made in terms of a provincial Act and legislation that was in force when the Constitution took effect and that is administered by a provincial government.

¹⁰² See George Devenish “The Legal and Constitutional significance of the Equality Clause in the Interim Constitution” 1996 7 *Stell LR* 92 at 93 and Albertyn and Kentridge 1994 10 *SAJHR* 149 at 151 (*supra*). Section 232(4) of the Interim Constitution stated that the Schedules (together with the Preamble and the Afterword) “shall for all purposes be deemed to form part of the substance of this Constitution” and could thus still serve as guides to constitutional interpretation. But compare Du Plessis who points out that the

A final point that needs to be made is that the interpretation, application and limitation of fundamental rights and freedoms can never be regulated exhaustively by the text of the South African Constitution. This is partly due to the abstract and open-ended nature of its formulations. Since its inception in 1995, the Constitutional Court has (with reliance upon the experiences of other jurisdictions with supreme constitutions)¹⁰³ formulated guidelines of how the Constitution in general and the Bill of Rights in particular could be interpreted. I shall now proceed with a *preliminary* exposition of these guidelines for (constitutional) interpretation, an exercise which is intended to serve as prelude to (as well as to contextualise) the analysis that will follow in Chapter 6 of this dissertation.¹⁰⁴

1 3 1 The Guidelines for Constitutional Interpretation employed by the South African Constitutional Court

The South African Constitutional Court seems aware that a (constitutional) text acquires meaning within the context in which it is situated since a reading of the court's decisions indicates that contextualisation of the South African Constitution takes place through grammatical,¹⁰⁵ teleological,¹⁰⁶ generous (broad),¹⁰⁷ historical,¹⁰⁸ systematical (or contextual)¹⁰⁹ and comparative (or international)¹¹⁰ interpretation. These hermeneutical techniques - although valuable in providing guidelines or aids to assist in (and enable) interpretation - are no magical formulas designed to provide instant or even infallible solutions to intricate constitutional dilemmas. Moreover, it must be borne in mind that these methods require both interpretation themselves

Postamble was included in the Interim Constitution by political negotiators as a basis for dealing with the issues of amnesty and indemnity and that it is probably not, therefore, intended to be a general declaration of values: see 1996 1 *Stell LR* 3 at 6 (*supra*).

¹⁰³ See, for example, par 1 3 1 2 - par 1 3 1 5 (*infra*).

¹⁰⁴ See par 1 2 3 (*supra*).

¹⁰⁵ See par 1 3 1 1 (*infra*).

¹⁰⁶ See par 1 3 1 2 (*infra*).

¹⁰⁷ See par 1 3 1 3 (*infra*).

¹⁰⁸ See par 1 3 1 4 (*infra*).

¹⁰⁹ See par 1 3 1 5 (*infra*).

¹¹⁰ See par 1 3 (*supra*).

as well as application in a specific (constitutional) context.¹¹¹

1 3 1 1 Literal Interpretation

In *S v Zuma*,¹¹² the Constitutional Court stressed (in its very first reported decision) that the interpretation of the Constitution must be grounded in the text itself. In the court's view, a constitution which embodies fundamental principles should - as far as its language permits - be given a broad construction. This constitutes a so-called *literal* or *grammatical interpretation* of a constitution.¹¹³ This technique of constitutional interpretation focuses on the role of language as vehicle facilitating access to the meaning of the constitutional text. It need not, however, be argued that a text of the complex nature of a constitution cannot be interpreted only by means of a literal interpretation of its provisions.¹¹⁴ The abstract and open-ended nature of its formulation (and the potential complexity of disputes arising from it) underline this reality. The Constitutional Court itself has pointed out that an interpretation which seeks to give expression to the underlying values of the Constitution cannot be realised only with a literal interpretation of the constitutional text.¹¹⁵ Thus, while a clear meaning of a constitutional provision must be taken into account, it may not necessarily be conclusive. Grammatical interpretation must therefore interact with other methods of interpretation.

¹¹¹ See De Ville who points out that the methods favoured by the Constitutional Court often provide conflicting indications as to meaning, thereby - in actual fact - obscuring interpretation. He, therefore, calls for a continuous re-evaluation of both the recognition and application of the methods of interpretation: see "Legislative History and Constitutional Interpretation" 1999 2 *TSAR* 211 at 222 - 223.

¹¹² 1995 (4) BCLR 401 (CC) at 413. The importance of the "language of an instrument, or the relevant portion of the instrument as a whole" has long since been affirmed by South African courts (*per* Innes J in *Venter v R* 1907 TS 910 at 913). For a recent example where this approach to interpretation was approved, see *Randburg Town Council v Kerksay Investment (Pty) Ltd* 1998 (1) SA 98 (CC).

¹¹³ Also sometimes referred to as the "ordinary" or "dictionary" meaning or interpretation of a provision or text.

¹¹⁴ See Albertyn and Kentridge 1994 10 *SAJHR* 149 at 151 (*supra*) who suggest that although the language of the Constitution cannot offer a definitive meaning, it may well constrain the range of available interpretations. Consequently, this technique of interpretation has to be considered *in relation* to the other techniques of constitutional interpretation. See also J de Waal et al *Handbook* at 117 (*supra*) who argue that "[a]s with ordinary language, the meaning of a constitutional provision depends on the context in which it is used."

¹¹⁵ See *S v Makwanyane* at 676 (*supra*), quoting *S v Zuma* CC Case No CCT/5/94 (reported on April 5, 1995).

1 3 1 2 Purpose-seeking Interpretation

Ever since the Constitutional Court was called upon to interpret the provisions of the Interim Constitution, it has on several occasions committed itself to a so-called *purpose-seeking interpretation*.¹¹⁶ The South African Constitutional Court has approved the Canadian Supreme Court's formulation of what a purpose-seeking approach to constitutional interpretation entails.¹¹⁷ It requires that the purpose of the right or freedom in question must be sought with reference to the character and larger objects of the constitution itself, the language used to articulate the specific right or freedom, the historical origins of the concepts enshrined and the meaning and purpose of other specific rights (where applicable) with which it is associated in the constitutional text. Therefore, in the Supreme Court's view, a purpose-seeking interpretation is generous and aimed at fulfilling the purpose of the right or freedom in order to secure the full benefit of the constitution's protection.¹¹⁸ In the case of the South African Constitution, this technique of interpretation would be aimed at giving effect to the constitutional values which underpin the fundamental rights and freedoms in an open and democratic society. The objective is thus to identify the interpretation of a constitutional provision that best supports and protects the values of human dignity, equality and freedom,¹¹⁹ thereby maximising constitutional coherence and promoting the values enshrined in the Preamble and the Bill of Rights.

¹¹⁶ This approach to constitutional interpretation is sometimes also referred to as "teleological" or "value orientated". I prefer the term "purpose-seeking" interpretation to "purposive" interpretation, for surely the purpose of a constitution can only be determined after the fact and thus interpretation *precedes* determination of purpose. Teleological interpretation thus involves the discovery of a purpose *to be realised*: see Du Plessis and Corder *Transitional Bill of Rights* 60 at 85 (*supra*), but compare Albertyn and Kentridge 1994 10 *SAJHR* 149 at 151 (*supra*). For but one example of how the Constitutional Court employed a purpose-seeking approach, see *S v Zuma* at 411 (*supra*).

¹¹⁷ In *S v Zuma* at 411 (*supra*). For a detailed exposition of instances where the Supreme Court of Canada has followed a teleological approach to interpretation, see Shalin Sugunasiri "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" 1999 22 *Dalhousie Law Review* 126. For more on the constitutional jurisprudence of the Canadian Supreme Court, see Chapter 4 of this dissertation par 4 3 and par 4 4 and accompanying footnotes (*infra*).

¹¹⁸ This formulation is attributed to Dickson CJ with reference to the Canadian Charter of Rights and Freedoms in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 344; 18 DLR 321 at 359 - 360. The exactness of Dickson CJ's formulation can, however, be questioned as it essentially only highlights the value of language, history and context in the determination of purpose, in other words, it refers to the *other* methods of constitutional interpretation.

¹¹⁹ These three values are enshrined in sections 1(a), 7(1), 9, 10, 36(1) and 39(1)(a) of Act 108 of 1996 (*supra*).

A purpose-seeking interpretation duly recognizes that constitutional litigation is primarily concerned with the assessment, weighing and balancing of principles, values and policy considerations within the context of the purpose, ideals and commitments of a constitution. It requires a value judgment to be made.¹²⁰ The (social) context¹²¹ in which particular rights and freedoms are claimed is therefore of primary importance. But, while the values referred to must be objectively determined with reference to the “norms, aspirations, expectations and sensitivities”¹²² of the people, they may not be derived from (or equated with) public opinion. The Constitutional Court has stressed that while public opinion *may* be relevant, it is in itself no substitute for the court’s duty to interpret the Constitution.¹²³ This approach makes sense, for if public opinion were to be decisive, the protection of rights may just as well be left to Parliament which is answerable to the public according to its (political) mandate. The Constitutional Court has indeed cautioned that if it were to attach too much significance to public opinion, it may be unable to fulfil its function to protect the rights of minorities and the socially marginalised.¹²⁴

1 3 1 3 Generous Interpretation

In realising that a constitution is *sui generis* and that it must “continue to play a creative role in the expression and achievement of the ideals and aspirations of the nation”,¹²⁵ the Constitutional Court has also approved of a *generous* or *broad interpretation* of the Constitution.¹²⁶ The majority of the court has on occasion interpreted section 241(8) of the Interim Constitution¹²⁷ to allow persons involved in cases pending at the commencement of the Final Constitution to rely

¹²⁰ A value judgment requires an *objective* articulation and identification of the contemporary norms, aspirations, expectations and sensitivities as expressed in a national constitution. A value judgment is not, therefore, a static exercise but a continually evolving dynamic: see *Ex parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) at 91.

¹²¹ For a discussion on contextual or systematical interpretation, see par 1 3 1 5 and accompanying footnotes (*infra*). On the significance of (social) context in a gender-specific assessment of pornography, see also Chapter 6 of this dissertation par 6 4 1 and par 6 4 3 and accompanying footnotes (*infra*).

¹²² *S v Williams* 1995 (7) BCLR 861 (CC) at 873 - 874.

¹²³ See *S v Makwanyane* at 703 (*supra*).

¹²⁴ *S v Makwanyane* at 703 (*supra*). See also *S v Williams* at 877 - 878 (*supra*).

¹²⁵ See *Minister of Home Affairs (Bermuda) v Fisher* at 328 - 329 (*supra*).

¹²⁶ See *S v Makwanyane* at 678 (*supra*) and *S v Mhlungu* at 799 - 800 (*supra*).

¹²⁷ Act 200 of 1993 (*supra*).

on the rights in the Interim Bill of Rights.¹²⁸ This was in spite of the apparently clear language of section 241(8) on which the minority of the court based its decision, an approach which the majority found to be too narrow and legalistic. Therefore, it would appear that where the constitutional text reasonably so permits, a broad interpretation should be preferred over a narrow interpretation if the result of the latter would be to deny persons the benefits of the Bill of Rights. A generous interpretation would not, however, produce the same outcome as a purpose-seeking interpretation for the simple reason that the latter will not always call for a generous interpretation. The constitutional context may indicate that in order to give effect to the purpose of a particular provision, a “narrower or specific meaning”¹²⁹ should be given to it. Although the Constitutional Court seems aware of the possibility that a broad interpretation may run counter to a purpose-seeking interpretation, it has not yet indicated how it would resolve such a tension.

1 3 1 4 Historical Interpretation

The Constitutional Court also makes use of *historical interpretation*. As to historical interpretation, a distinction can be drawn between legal historical interpretation (which traces the history of the content of a legal provision, concept or principle)¹³⁰ and legislative historical interpretation (which traces the drafting history of a legal provision in the parliamentary or constitutional negotiating process).¹³¹ South African writers are not, however, in agreement on whether legislative historical interpretation should play a role in constitutional interpretation. While some writers outrightly reject legislative historical interpretation as an approach to constitutional interpretation,¹³² others give this type of historical interpretation a secondary role, to be used only to “confirm the results achieved by the more objective methods of constitutional

¹²⁸ *S v Mhlungu* at 799 - 800 (*supra*).

¹²⁹ See *Soobramoney v Minister of Health (KwaZulu-Natal)* (unreported; handed down on November 27, 1997) par 17. See also *S v Makwanyane* at 676 n 8 (*supra*).

¹³⁰ See, for example, *S v Zuma* at 416 - 419 (*supra*).

¹³¹ For a discussion of legislative historical interpretation, see De Ville 1999 2 *TSAR* 211 (*supra*).

¹³² Etienne Mureinik would count among those authors who regard the drafting history of the South African Constitution as totally inappropriate to constitutional interpretation: see “A Bridge to Where? Introducing the Bill of Rights” 1994 *SAJHR* 31. Dennis Davis appears to reject the theory of original intent, yet does not explicitly indicate whether legislative historical interpretation should nevertheless be permissible: see “Democracy - its influence on the process of Constitutional Interpretation” 1994 *SAJHR* 103 at 106 - 112.

interpretation".¹³³

On the matter of historical interpretation as technique of constitutional interpretation, both the political history of South Africa and the drafting history of the Constitution merit consideration. The Constitutional Court seems to regard the peculiar political history of South Africa as an important factor in the interpretation of the constitutional text.¹³⁴ It was suggested above¹³⁵ that whereas the past was pervaded by inequality, authoritarianism and repression, the aspirations of the future are expressed in the fundamental values enshrined in our Constitution. The Constitution must therefore be interpreted "so as to give effect to the purposes sought to be advanced"¹³⁶ by it.

By contrast, the drafting history of the South African Constitution appears to be of little value to constitutional interpretation. The view held by the Canadian Supreme Court¹³⁷ to the effect that the statements of individual role players¹³⁸ who were part of the negotiation and drafting process must be treated with caution regardless of how prominent a role they might have played,

¹³³ Du Plessis and Corder grant a role to historical interpretation (the "preponderantly subjective method") together with the other ("objective") methods of constitutional interpretation: see *Transitional Bill of Rights* at 83 - 85 (*supra*). Kentridge and Spitz regard historical interpretation as a useful aid but only as part of establishing the purpose of a constitutional provision: see "Interpretation" in M Chaskalson et al *Constitutional Law of South Africa* (1998) 11-18 to 11-19.

¹³⁴ This is particularly true in respect of issues pertaining to race or gender: see Chapter 6 of this dissertation par 6 4 2 4 and accompanying footnotes (*infra*). See also *S v Mhlungu* at 799 - 800 (*supra*) and *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC).

¹³⁵ See par 1 1 (*supra*).

¹³⁶ See *Shabalala v Attorney-General of the Transvaal* at 1605 (*supra*). A similar sentiment is expressed by the Constitutional Court in *S v Williams* at 878 - 879 (*supra*) and *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at 768. In *Brink v Kitshoff NO* (*supra*) the court stressed that South Africa's history is of particular relevance to the concept of equality. Accordingly, it is in the light of the history of apartheid and its enduring legacy that the equality clause needs to be interpreted. See also Chapter 6 of this dissertation par 6 4, especially par 6 4 1 and accompanying footnotes (*infra*).

¹³⁷ See *Reference re section 94(2) of the Motor Vehicle Act (British Columbia)* (1986) 18 CRR 30 at 49; *United States v Cotroni* (1990) 42 CRR 101 at 109 and *Mahe v The Queen in Right of Alberta* (1990) 46 CRR 193 at 214.

¹³⁸ The statements of individual public servants and other role players made during the negotiation and drafting process of a constitution is sometimes called the *ipse dixit* of the political role players.

is endorsed by the South African Constitutional Court.¹³⁹ But the Constitutional Court does seem to attach *some* value to background materials¹⁴⁰ (including reports of technical committees) compiled during the drafting process. The Constitutional Court views background materials as part of the context for the interpretation of the Constitution which should - on this basis - not be excluded as evidence.¹⁴¹ The weight to be given to it will be determined by the nature of the evidence and purpose for which it may be rendered.¹⁴²

1 3 1 5 Contextual Interpretation

The fifth technique of constitutional interpretation employed by the South African Constitutional Court is so-called *contextual* or *systematical interpretation*.¹⁴³ This method of constitutional interpretation recognises that the Constitution cannot be read as if it consisted of a series of individual, isolated provisions. It therefore serves as confirmation that it is not individual provisions - read in isolation - which are supreme, but the whole of the Constitution *read in*

¹³⁹ See *S v Makwanyane* at 680 (*supra*).

¹⁴⁰ The European Court of Human Rights and United Nations Committee on Human Rights both, for example, allow their deliberations to be informed by *travaux préparatoires*: see *Cox v Canada* UN Commission on Human Rights, Communication No 539/1993 (handed down on November 3, 1993) at 19. On the significance of *travaux préparatoires* in respect of articles 8 - 11 of the Universal Declaration of Human Rights, see David Weissbrodt and Matthias Hallendorff "Travaux Préparatoires of the Fair Trial Provisions: Articles 8 to 11 of the Universal Declaration of Human Rights" 1999 21(4) *Human Rights Quarterly* 1061.

¹⁴¹ See *S v Makwanyane* at 679 - 680 (*supra*).

¹⁴² In *Christian Lawyers Association of South Africa v Minister of Health* 1998 (11) BCLR 1434 (TPD) the court followed a restrictive approach with regard to the interpretation of the word "everyone" in section 11 of Act 108 of 1996 which guarantees the right to life. Evidence of circumstances surrounding the adoption of the Choice on Termination of Pregnancy Act 92 of 1996 was *in casu* found not permissible.

¹⁴³ The Constitutional Court has shown itself to be acutely aware of the need to place constitutional provisions within their broader context. Decisive use of context was made by the Constitutional Court in *Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Policy Bill 83 of 1995* 1996 (4) BCLR 537 (CC); *Soobramoney v Minister of Health (KwaZulu-Natal)* (*supra*); *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (7) BCLR 880 (CC); *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC); *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (7) BCLR 771 (CC); *S v Baloyi* 2000 (1) BCLR 86 (CC); and *DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 (4) BCLR 347 (CC).

context.¹⁴⁴ The different forms of context which can be considered include the history and background to the adoption of the Constitution and other constitutional provisions, in particular other provisions of the Bill of Rights.¹⁴⁵

In Canadian jurisprudence, a contextual approach to constitutional interpretation is seen as an enterprise which includes grammatical, systematic, historical as well as comparative interpretation.¹⁴⁶ Although contextual interpretation is a helpful tool for constitutional interpretation, the South African Constitutional Court has highlighted a few broad principles which must be observed. To this effect, context may not, for example, be used to limit rights, for the criteria for a limitation of rights laid down in section 36¹⁴⁷ of the South African Constitution must at all times be observed. Therefore, context may apparently only be used as

¹⁴⁴ See *S v Makwanyane* at 676 - 677 (*supra*) and *Soobramoney v Minister of Health (KwaZulu-Natal)* par 16 (*supra*). In *S v Makwanyane* (*supra*), the Constitutional Court used the right to life, the right to equality and the right to dignity to support the conclusion that the death sentence operates arbitrarily and discriminatorily and thus constitutes a cruel, inhuman and degrading form of punishment under section 11(2) of the Interim Constitution. See also Chapter 6 of this dissertation par 6 5 1 and accompanying footnotes (*infra*).

¹⁴⁵ See, for example, *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at 271. On the Constitutional Court's understanding of the context which can be considered, see *S v Zuma* at 411 (*supra*): "regard must be paid to the legal history, traditions and usages of the country concerned"; *S v Makwanyane* at 687 - 688 (*supra*) *per* Chaskalson J: "we are required to construe the South African Constitution ... with due regard to our legal system, our history and circumstances"; *Coetzee v Government of the Republic of South Africa* at 1401 (*supra*) *per* Sachs J: "[r]ights are not self-explanatory. They are principled constructions informed by social history"; *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) at 770 *per* Ackermann J, O'Regan J and Sachs J: "given the history of our country we are of the view that 'discrimination' has acquired a particular pejorative meaning"; *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* 1999 (12) BCLR 1360 (CC) par 44: "[p]rovisions of the Constitution had to be construed purposively and in the light of the constitutional context in which they occurred. History could not be ignored in that process" and *Dawood v The Minister of Home Affairs* CCT 35/99 (handed down on June 7, 2000) par 35: "[t]he Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied."

¹⁴⁶ See *Edmonton Journal v Alberta (Attorney-General)* [1989] 2 SCR 1326 at 1355; 64 DLR (4th) at 583 - 584 where Wilson J pointed out that a court must recognize that a particular right or freedom may have a different value depending on its context. See also *R v Turpin* [1989] 1 SCR 1296 at 1331; *Andrews v Law Society of British Columbia* [1989] 56 DLR (4th) 1 at 10.

¹⁴⁷ For the full text of section 36 of Act 108 of 1996 (*supra*), see n 65 (*supra*). See also Chapter 6 of this dissertation par 6 4 2 2 (*infra*).

technique of interpretation to establish the purpose or meaning of a constitutional provision¹⁴⁸ and not as a shortcut to identify and focus only on so-called relevant fundamental rights and freedoms, thus ignoring other possibly relevant provisions of the Bill of Rights.¹⁴⁹

The hermeneutical guidelines for constitutional interpretation employed by the Constitutional Court that I have discussed in the paragraphs above will be considered more fully in Chapter 6 below in connection with the constitutional arguments¹⁵⁰ that might be advanced against adult heterosexual pornography.

1 4 CONCLUDING OBSERVATIONS

Although both the Interim and Final Constitutions embody firm commitments to the principle of equality between men and women,¹⁵¹ Felicity Kaganas and Christina Murray rightly point out that:

“the nature of [apartheid] oppression invariably means that liberation secured in political manifestos or legal compacts such as the 1993 Constitution does not necessarily mean liberation [for women] in *practice*. It is the way in which legal rights are translated into reality and the way they are supplemented by social change that determine whether they change women’s lives.”¹⁵²

Since the inception of a constitutional democracy in 1994, serious disparities in the socio-political conditions of women have surfaced in South Africa. At the heart of the present social reality of South African women stands a fundamental dichotomy. Although formal impediments to women’s advancement have been removed and women enjoy political representation at both national¹⁵³ and provincial level,¹⁵⁴ studies indicate that instances of violent crime against women

¹⁴⁸ But compare *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC).

¹⁴⁹ But compare *Soobramoney v Minister of Health (KwaZulu-Natal)* (*supra*); *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC) at 1380 and *East Zulu Motors v Epangeni / Ngwelezane Transitional Council* 1998 (1) BCLR 1 (CC).

¹⁵⁰ See par 1 2 3 and accompanying footnotes (*supra*).

¹⁵¹ See, for example, par 1 1 - par 1 3 (*supra*). See also Chapter 6 of this dissertation par 6 4, especially par 6 4 1 and accompanying footnotes (*infra*).

¹⁵² See “Law and Women’s Rights in South Africa: An Overview” in C Murray (ed) *Gender and the New South African Legal Order* (1994) 1. My emphasis.

¹⁵³ After the June 1999 general elections, eight women (out of 27 portfolios) were appointed to Cabinet. They are Ministers Nkosazana Dlamini Zuma (Foreign Affairs), Ivy Matsepe-Casaburri (Communications), Mantombazana Tshabalala-Msimang (Health), Thoko Didiza (Agricultural and Land Affairs), Phumzile Mlambo Ngcuka (Mineral and Energy Affairs), Geraldine Fraser-

have escalated to epidemic proportions in South Africa in the last decade.¹⁵⁵ Consequently, in his first Address to the Nation as President in commemoration of National Women's Day,¹⁵⁶ Thabo Mbeki conceded that the plight of women in South Africa warrant urgent attention and decisive action at the highest level. Not only is the high incidence of physical attacks against women reason for concern, but so too is the degree of brutality of these attacks. The viciousness and cruelty of assaults against women has become more acute: rape now translates into gang rape, accompanied by torture, mutilation and murder.¹⁵⁷ These conditions have led Carol Bouwer, Director of Rape Crisis (Cape Town) to equate the brutality of rape, sexual assault and battery of South African women and female children to levels encountered in war ravaged societies.¹⁵⁸

These conditions are also substantiated by findings published by the Medical Research Council (MRC).¹⁵⁹ Research conducted by its Centre for Epidemiological Research shows that almost half of the 1394 men in service of the three municipalities of the Cape metropolitan area have either physically or sexually abused their wives in the course of the past ten years.¹⁶⁰ Members of the South African Municipal Worker's Union (SAMWU) in service of the municipality of Cape Town (together with two municipalities in the Cape metropolitan area who did not want to disclose their identity) took part in the study. A similar study was conducted in the Eastern Cape Province, Mpumalanga and the Northern Province by the Council's Centre for

Moleketi (Public Services and Administration), Stella Sigcau (Public Works) and Sankie Mthembu-Mahanyele (Housing).

¹⁵⁴ Yet after June 1999 only one of the nine provinces is lead by a woman. Winkie Direko was appointed Premier of Free State Province.

¹⁵⁵ See, for example, Vogelmann and Eagle 1991 18(1-2) *Social Justice* and Wood and Jewkes April 1998 Medical Research Council: CERSA (Women's Health) n 58 (*supra*).

¹⁵⁶ President Mbeki's address was broadcast on national television on August 9, 1999.

¹⁵⁷ These conditions were highlighted by speakers - including Deputy President Jacob Zuma - at a Conference on Gender and Violent Crime against Women and Children held in Cape Town on September 28, 1999.

¹⁵⁸ See "Misdadigers teen vroue, kinders 'moet swaarste strawwe kry'" *Die Burger* September 29, 1999.

¹⁵⁹ Two reports were published by the Medical Research Council's Division for Women's Health in August 1999. See Abrahams et al (CERSA:Tygerberg) 1 - 26 and Jewkes et al (CERSA: Pretoria) 3 - 23. See also n 58 (*supra*).

¹⁶⁰ Abrahams of the Medical Research Council gathered the statistics for the study conducted in the Western Cape. See also n 58 (*supra*).

Epidemiological Research: Division for Women's Health.¹⁶¹ The findings of this study were found to correspond with those in the Western Cape.

It need not, therefore, be argued that much more needs to be done in South Africa to promote an effective guarantee of women's constitutional interests in equality, human dignity and physical integrity.¹⁶² It will be stressed throughout this dissertation that South African courts (and the Constitutional Court in particular) are in a position to play a significant role in drawing attention to all barriers which effectively prevent the achievement of substantive equality for women. It will be argued that this calls for our courts to (re)conceptualise pornography as, *inter alia*, a practice of gender discrimination which impacts upon women's fundamental rights and freedoms. South African courts accordingly need to explore the positive role they can play in bringing about a change in deep-rooted popular (including legal) (mis)conceptions about pornography. This will necessitate a move away from a libertarian analysis of the problem. No restriction on pornography will pass the requirements of the South African Constitution unless our courts accept that there exists *some* link between pornography and instances of direct physical and/or social harm to women and that the prevention of this harm goes to the core of the values of a democracy based on dignity, equality and non-violence. Should South African courts fail to do so, they may well have a direct hand in the perpetuation of the sexually based subordination of women in this country. Moreover, in view of the fact that the law carries in part the responsibility for the subordination of women, the law is the appropriate vehicle to establish gender equality. Karl Klare sounds an apt warning that "[f]uture generations will judge the Constitutional Court by the contribution it makes to achieving equality, advancing social justice, and deepening the culture of democracy, multiculturalism, and respect for human dignity."¹⁶³ And once perceptual changes take place, perhaps society too will find it in a position to meet its social responsibility to act positively against all structures of gender oppression.

¹⁶¹ This study was led by Jewkes who is the Head of the MRC Centre for Epidemiological Research: Division for Women's Health. See also n 58 (*supra*).

¹⁶² The long awaited Domestic Violence Act 116 of 1998 is a case in point. In spite of the desperate need for its implementation, Parliament has accommodated various delays in passing the necessary regulations which would introduce measures to ensure that the relevant organs of state give full effect to the provisions of the Act. Some reservations were expressed by the South African Police Service on its implementation pertaining to a lack of infrastructure and training. Earlier the SAPS also lobbied against a clause in the draft bill which imposed obligations and a criminal sanction for non-compliance. This led to the replacement of the criminal sanction with a clause providing for internal disciplinary action. Act 116 of 1998 eventually came into force on December 15, 1999.

¹⁶³ See "Legal Culture and Transformative Constitutionalism" 1998 14(1) *SAJHR* 146 at 171 - 172.

CHAPTER 2

THEORETICAL FRAMEWORK

| | PAGE |
|--|------|
| 2 1 INTRODUCTION | 33 |
| 2 2 FEMINISM | 35 |
| 2 2 1 A Brief Overview of the Three Phases of Feminism | 37 |
| 2 3 LIBERAL FEMINIST THOUGHT | 39 |
| 2 3 1 The Philosophical Foundation of Liberal Feminism | 39 |
| 2 3 2 A Critical Assessment of the Theoretical Tenets of Liberal Feminism | 42 |
| 2 3 2 1 The Liberal Feminist Position on the Role of the Law and the State | 43 |
| 2 3 2 2 The Liberal Conception of Human Nature | 44 |
| 2 3 2 3 The Liberal Conception of (Human Reason) | 46 |
| 2 3 3 3 The Liberal Conception of (Gender) Equality | 48 |
| 2 3 2 5 The Liberal Distinction Between the Private and Public Sphere | 50 |
| 2 3 3 The Suitability of Liberal Feminism as Theoretical Framework in Formulating a Constitutional Response to Adult Heterosexual Pornography | 51 |
| 2 4 RADICAL FEMINIST THOUGHT | 54 |
| 2 4 1 The Radical Feminist Theory of Patriarchy | 57 |
| 2 4 2 The Radical Feminist Structures of Patriarchy | 61 |
| 2 4 2 1 The State as Patriarchal Structure | 61 |
| 2 4 2 2 Patriarchy, Sexuality and Sexual Violence | 62 |
| 2 4 2 3 Sexuality, Patriarchal Violence and Pornography | 64 |
| 2 4 3 An Assessment of the Suitability of Radical Feminism as Theoretical Framework in Formulating a Constitutional Response to Adult Heterosexual Pornography | 68 |
| 2 5 CONCLUDING OBSERVATIONS | 71 |

CHAPTER 2

THEORETICAL FRAMEWORK

"A distinctively feminist theory conceptualizes social reality, including sexual reality, on its own terms ... [t]his requires capturing it in the world, in its situated social meanings, as it is being constructed in life on a daily basis. It must be studied in its experienced empirical existence, not just in the texts of history (as Foucault does), in the social psyche (as Lacan does), or in language (as Derrida) does. Sexual meaning is not made only, or even primarily, by words and in texts. *It is made in social relations of power in the world, through which process gender is also produced.*"¹

"Radical feminism starts with the idea of sexism as gender, the idea that gender is socially constructed within a hierarchy that embodies male domination and female subordination. Everything else flows from that. One may agree or disagree with this idea, *but it cannot be reduced to another theory.*"²

2.1 INTRODUCTION

This chapter serves to establish a theoretical framework for the present study towards realizing the objectives set out in the preceding chapter.³ As suggested above,⁴ the appropriate framework must be capable of facilitating a woman-centred analysis of adult heterosexual pornography by upholding women's constitutional interests in equality, dignity and physical integrity. Since pornography will be conceptualised as a feminist concern in this dissertation, I employ the term "woman-centred analysis" to denote an enterprise which proceeds from the social reality and experiences of women under a system of patriarchy⁵ with due recognition of the possible

¹ Catharine MacKinnon "Sexuality" in *Toward a Feminist Theory of the State* (1989) 126 at 129 (hereinafter referred to as *Feminist Theory*). My emphasis.

² Patricia Smith "Feminist Jurisprudence and the Nature of Law" in *Feminist Jurisprudence* (1993) 3 at 9. My emphasis.

³ See Chapter 1 of this dissertation par 1.2.1 - par 1.2.5 and accompanying footnotes (*supra*).

⁴ See Chapter 1 par 1.2.1 (*supra*).

⁵ I use the term patriarchy in the present study to refer to the pervasive dominance in (and of) society, law and politics by the male hierarchy. Alison Jaggar points out that "patriarchy" literally means "rule by the fathers" and that prior to the emergence of feminism, the term was used mostly within anthropology to refer to societies where the basic social unit consists of the family centred around one old man with absolute power over wives, children, dependents and herds: see "Radical Feminism and Human Nature" in *Feminist Politics and Human Nature* (1988) 83 at 102 - 103 (hereinafter referred to as *Feminist Politics*). See also par 2.4, especially par 2.4.1 and accompanying footnotes (*infra*).

interrelationship between pornography and women's (sexual) identity, autonomy and status. A woman-centred analysis could therefore generate an understanding of adult heterosexual pornography as, *inter alia*, a patriarchal practice within the power structures of existing gender inequality in order to facilitate constitutional arguments against pornography with the common purpose to promote the achievement of (substantive) equality.

The social reality of South African women accentuates that the context within which the constitutional implications of pornography must be decided is not exclusively that of a history of repressive conservatism. South Africa's history of (racial and gender) oppressive inequality also created a climate in which social evils - notably violence against women - could flourish.⁶ Consequently, the required theoretical framework should not only embrace unconditionally the strong non-sexist and non-racist spirit of the South African Constitution⁷ and new legal order, but should also be capable of recognizing and addressing the plight of South African women under conditions of violence and subordination.

There exist - to my mind - compelling reasons to assume a feminist stance on adult heterosexual pornography. Only a feminist analysis of pornography has the potential to draw into the debate the importance of fundamental human rights, the superficiality of equality rhetoric (and its hidden consequences),⁸ the construction of sexuality (and gender), the significance of (social) representation, the legitimacy of state power in relation to regulation, etc. Since no philosophical tradition other than feminism analyses the patriarchal nature of institutions, only feminist

⁶ Joanne Fedler therefore rightly argues that in order to formulate a response to pornography that extends beyond individual perceptions, it is imperative to consider the context for only context can facilitate constraints in subjective meaning: see "A Feminist Critique of Pornography" in J Duncan (ed) *Between Speech and Silence: Hate Speech, Pornography and the new South Africa* (1996) 45 at 50.

⁷ See, for example, the Preamble, section 1(a) of the Founding Provisions and sections 7(1), 9, 10, 36(1) and 39(1)(a) of the Bill of Rights in Act 108 of 1996.

⁸ The peculiar problems of especially the liberal conception of equality will be discussed in par 2 3 2 4 (*infra*). The demand for the equal treatment of individuals - regardless of actual circumstances - presupposes that all persons are equal bearers of rights within a just social order. But by extending the same rights and liberties to all in accordance with the same objective standard, inequality could in actual fact be exacerbated rather than eliminated: see Catherine Albertyn and Janet Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 10 *SAJHR* 149 at 152 - 153. The liberal conception of equality as non-differentiation could thus actually serve to reinforce rather than expose gender stereotypes: see Wendy Williams "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" in KT Bartlett and R Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (1991) 15 (hereinafter referred to as *Feminist Legal Theory*).

jurisprudence has the potential to facilitate a critical analysis of the law as a patriarchal construct. The feminist movements in Northern America, Europe and Australasia have, for example, provided valuable (legal) insights into the situation of women by conceptualising patriarchal power and pornography as threats to gender equality.⁹ But due to the diverse nature of feminist thought and the multiplicity of feminist accounts of women's oppression, a broad and general feminist analysis will be hard pressed to make critical sense of the constitutional implications of pornography. This chapter must, therefore, rise to the challenge of establishing a feminist discourse (or discourses) that could be utilized both as analytical and equality framework. To this end, two feminist frameworks - each yielding a distinct conception of women's oppression - will be considered. The basic tenets of liberal feminism and radical feminist thought will be assessed in the present chapter against the backdrop of the plan set out in the preceding chapter. Since liberal thought constitutes the conceptual framework for pornography in most legal systems, it follows that the capacity of liberal feminism to meet the challenges at hand will have to be assessed.¹⁰

Consequently, the themes that will be addressed in this chapter centre around liberal and radical feminist conceptions of the situation of women. In what follows next, I shall provide a *brief* account of feminist theory in modern jurisprudential thought for two reasons. First, to set out the broad (historical and theoretical) ambit within which the discourse on the oppression of women is conducted and secondly, to serve as platform for the feminist frameworks that I intend to employ in the present study.¹¹

2 2 FEMINISM

The term "feminism" is notoriously elusive to define.¹² Alison Jaggar employs an inclusive definition of feminism which is well suited to the aspirations of the present study. She notes that feminism is aimed, in one way or another, at advancing the position of women and thus the term is commonly used to refer to all those who seek, no matter on what grounds, to end women's

⁹ See, in general, Desiree Hansson and Diana Russell in S Jagwanth et al *Women and the Law* (1994) 431 - 436.

¹⁰ See par 2 3 3 (*infra*).

¹¹ See par 2 3 and par 2 4 (*infra*).

¹² Leslie Bender dates the term "feminism" to the early twentieth century and employs it to signify the advocacy of revolutionary changes to the status of women: see "A Lawyer's Primer on Feminist Theory and Tort" 1988 30 *Journal of Legal Education* 3 at 5 - 6.

subordination.¹³

In spite of the diversity within and interdisciplinary nature of current feminist discourse, common touchstones within its structure can be identified. One of the primary tasks of feminism is to create awareness of the ways in which patriarchy has distorted issues of gender, law and politics. The various foundations for the (legal) subordination of women that have been highlighted in feminist discourse¹⁴ thus all serve to facilitate substantive change. The exposure of myths about patriarchy¹⁵ and legal objectivity,¹⁶ the identification of discriminatory practices, the undermining of traditional boundaries between the “personal” and the “political” and its commitment to substantive and social change are all common benchmarks within the structure of feminist theory. The political nature of feminist discourse is particularly evident in its conceptualization of women’s oppression. Most feminist theory views the oppression of women as the consequence of human agency¹⁷ which manifests as the imposition of unjust restrictions¹⁸ on women’s

¹³ See “Feminism as Political Philosophy” in 1988 *Feminist Politics* 1 at 5 (*supra*).

¹⁴ See par 2 2 1 (*infra*).

¹⁵ One of the most pervasive - and thus powerful - myths propagated by patriarchy is that men have a natural right to dominate women. Ann Scales uses the compelling example of the Greek myth of Athena, the goddess of wisdom: because Athena was not born a woman but sprang fully grown from the forehead of her father, Zeus, she is represented as a patriarchal female stereotype and a projection of male needs, always at her father’s side - a product and “an avowed servant of patriarchy”: see “The Emergence of Feminist Jurisprudence: An Essay” 1986 *Yale Law Journal* 1373 at 1379.

¹⁶ The law and legal system have - almost without exception - confined the roles of women to those of wife, mother and domestic. Because legal, social, economic and political systems have been completely dominated by men, the most powerful public roles have been reserved for and by men. The male character of law is, for example, illustrated by an overt display of sexism in legal language, the competitive, adversarial character of the legal system and the positivistic doctrine that all law is “man-made”: see, in general, Bender 1988 30 *Journal of Legal Education* 3 at 13 (*supra*) and Clare Dalton “Where We Stand: Observations on the Situation of Feminist Legal Thought” 1988 3 *Berkeley Women’s Law Journal* 1.

¹⁷ But compare the radical feminist view of women’s oppression which proceeds from the argument that male oppression in fact *denies* women agency to take decisions about their own bodies and/or lives: see par 2 2 1 n 27 (*infra*) and par 2 4, especially par 2 4 2 and accompanying footnotes (*infra*).

¹⁸ Jaggard employs a useful example: the democratic decision to divide the limited food supply on a desert island into equal parts between the survivors of a shipwreck would impose a restriction on the freedom of each survivor to eat his/her fill. However, in this instance the restriction on freedom would not be oppressive, because the distribution is just: see *Feminist Politics* (1988) 1 at 6 (*supra*).

freedom and equality, suggesting that the problem is caused by one group actively subordinating another group to further its own interests. Liberation then becomes the (political) correlate of oppression, resulting in release from oppressive constraints. Therefore, a feminist world view includes two groups with conflicting interests and therefore presupposes a dynamic view of society that is - in some instances - strongly influenced by the Marxist idea of the (economic) class struggle.

The diversity and complexity of current feminist thought largely emanate from the women's liberation movement and consciousness-raising groups of the 1960s.¹⁹ Historically two waves of feminism can be identified in the United States. The first wave spans almost one hundred years from 1830 to 1920 and the second wave dates from 1960 to the present.²⁰ Since feminist legal theory in modern jurisprudential thought developed in three phases,²¹ I shall next provide a brief exposition of these phases.

2 2 1 A Brief Overview of the Three Phases of Feminism

Whereas first phase feminism²² is characterised by its classical liberal (or egalitarian) perspective and its focus on campaigns directed at the extension of civil rights and liberties to women resulting in calls for the fair, rational and impartial treatment of women,²³ second phase

¹⁹ See par 2 2 1 and par 2 4 and accompanying footnotes (*infra*).

²⁰ See Sandra Kemp and Judith Squires "Introduction" in S Kemp and J Squires (eds) *Feminisms* (1997) 3.

²¹ For a useful account of the different phases in feminist thought, see Adrienne van Blerk "Feminism and the law" in *Jurisprudence: An Introduction* (1996) 171 at 174 - 183.

²² First phase feminism is a product of the nineteenth century. Bender, however, traces the earliest stirrings of feminism as far back as 1792 when Mary Wollstonecraft published *A Vindication of the Rights of Women*: see 1988 30 *Journal of Legal Education* 3 at 12 n 25 (*supra*). In the nineteenth century, the concept of women as property through the institution of marriage highlighted women's loss of property, contract rights, legal identity and physical and sexual authority. Whereas the latter found expression in the fight for legal access to contraceptives, the relegation of women to the private sphere highlighted issues of citizenship, the right to enter political office and the professions. These liberal arguments for the fair, rational and impartial treatment of women were based on the assumption that the law comprises neutral norms and principles of universal human rights, an assumption which second phase feminism rejected.

²³ It is from this civil and political context that liberal feminism emerged: see par 2 3 and accompanying footnotes (*infra*).

feminism²⁴ produced sophisticated theoretical accounts of the differences between men and women.²⁵ The widespread growth in educational opportunities for women, coupled with their eventual entry into various previously all-male professions and the recognition of reproductive rights, paved the way for the women's liberation movement of the 1960s.²⁶ The various conceptualizations of women's difference produced a rich political and philosophical context from which radical feminism²⁷ and relational feminism²⁸ respectively emerged. Third phase (or postmodern) feminism introduced a scepticism of a single solution to the oppression of women and thus assumes an anti-essentialist stance on equality and difference.²⁹ This has entailed a

²⁴ The women's liberation movement of the 1960s surpassed all earlier waves of feminism in the ambit of its concerns and depth of its critiques and is regarded as the major version of feminism in contemporary Western society. The language favoured by 1960s feminism (such as "oppression" and "liberation") reflected significant development in the political perspective of contemporary feminism.

²⁵ Initially, difference was seen as biological and accordingly, the biological role of women as child bearers was seen as the root cause of women's oppression. Shulamith Firestone was the first to assert that pregnancy was invasive, dangerous and oppressive. It follows that real liberation for women could, therefore, only occur when human reproduction outside the female body becomes possible: see 1970 *The Dialectic of Sex* (London: Women's Press). See also West "Jurisprudence and Gender" in KT Bartlett and R Kennedy (eds) *Feminist Legal Theory* (1991) 178 at 201 and 213 - 214.

²⁶ See S Kemp and J Squires (eds) *Feminisms 3* (*supra*).

²⁷ Radical feminism views the difference between men and women as one of power, finding expression in male dominance and female subordination. See also par 2 4 and accompanying footnotes (*infra*).

²⁸ The term relational feminism (as opposed to "maternal feminism") is employed by Smith: see *Feminist Jurisprudence 3* at 9 (*supra*). Relational feminism is thought to have developed from the educational psychologist Carol Gilligan's influential 1982 publication *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press) (hereinafter referred to as *In a Different Voice*). See also "In a Different Voice: Women's Conceptions of Self and of Morality" 1977 47(4) *Harvard Educational Review* and "Woman's Place in Man's Life Cycle" 1979 49(4) *Harvard Educational Review*. Relational feminists view the difference between men and women as more than biological and distinguish a distinctly male versus distinctly female moral development. The former is primarily centred upon autonomy, abstract rules, principles and rights. Relationships have only a secondary value. The distinctly female point of view finds expression in the preservation of relationships and concern for others, constituting an "ethic of care". Whereas the male attitude towards the self is oppositional, the female attitude is relational. Relational feminism thus calls for the integration of the feminine ethic of care into the law and legal institutions.

²⁹ Postmodern feminists see the idea of Woman (like the idea of Self) as socially constructed, an idea built on the breakthrough insight of the French existentialist writer Simone de Beauvoir's claim that one is "not born, but

critique of modern foundationalist theories based on the conviction that a single theory could in itself explain the many facets of the oppression of women.³⁰

I shall now proceed with an exposition of the theoretical bases of the alternative and primary (legal) arguments that I intend to employ against adult heterosexual pornography in the present study. To this end, I shall first discuss the philosophical tradition from which liberal feminism emanates, whereupon I shall critically assess liberal feminism as suitable theoretical framework. Thereafter, I shall discuss and assess radical feminist thought. Both discussions will conclude with a formulation of the constitutional arguments against adult heterosexual pornography, emanating from within the ambit of these two respective feminist frameworks, that will be explored fully in Chapter 6 of this dissertation.

2 3 LIBERAL FEMINIST THOUGHT

2 3 1 The Philosophical Foundation of Liberal Feminism³¹

Liberal feminism is an extension of traditional liberalism which emerged with the growth of capitalism in the seventeenth century. Liberalism - which dominates Anglo-American legal and political thinking - raised demands for democracy and political liberties. These demands were

rather become[s] a woman": see *The Second Sex* (1949; reprinted 1972) (Harmondsworth: Penguin). As social constructs, postmodern feminists view them as products of various changing and contradictory social discourses, including the discourse of the law. See also par 2 4 3 and accompanying footnotes (*infra*).

30

See Katharine Bartlett "Gender Law" 1994 1 *Duke Journal of Gender Law & Policy* 1 at 6 who points out that the postmodern critique of foundationalist theories is three-fold. Postmodernism mainly targets the foundationalist assumption of universalism, that "woman" is a self-explanatory, natural category and its prioritisation of sex as a basis of discrimination. Black feminism in itself also challenged radical feminism significantly. For a black feminist critique of radical feminism's understanding of essentialism, see, *inter alia*, Mari Matsuda "Looking to the Bottom: Critical Legal Studies and Reparations" 1987 22 *Harvard Civil Rights - Civil Liberties Law Review* 232 and "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" 1989 11 *Women's Rights Law Reporter* 7; Angela Harris "Race and Essentialism in Feminist Legal Theory" 1990 42 *Stanford Law Review* 581; and Emma Coleman Jordan "Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Faults Line in Political Discourse" 1992 15 *Harvard Women's Law Journal* 1.

31

The importance of tracing the philosophical tradition from which liberal feminism emanates is not only limited to this chapter, for the themes to be addressed in Chapters 3, 4 and 5 of this dissertation also bear directly upon an understanding of the main tenets of liberal legal and political thought.

based on the Enlightenment assumption that there is a "universal, stable and pre-political identity which is owed fundamental rights due to one's human status rather than social, political, or historical conditions".³² The core elements of liberalism - namely abstract individualism, neutrality, rationality, pre-political private rights and the distinction between the private and public sphere - have all been incorporated into liberal feminist theory.³³

Since individual autonomy is the cornerstone of liberal thought, liberalism conceptualises humans as independent, rational beings. The human capacity for reason is assumed to be a mental capacity that is possessed in equal measure by all human beings.³⁴ Consequently, physical capacities (or incapacities) are conceived as irrelevant to liberal political theory for liberalism does not place any philosophical importance on the (accidental) differences between individuals in status, class, race or sex.³⁵ The liberal conception of rationality is thus based on the assumption that the individual is ontologically prior to society.³⁶ Since individuals are the basic constituents of social groups, liberalism perceives the self as an autonomous, rational being who joins social life only to further self-centred interests³⁷ and values.³⁸ The liberal account of human

³² Robin Fields "In Search of Democracy: Reconciling Majority Rule, Minority Rights and Group Rights in South Africa and the United States" 1996 16 *Boston College Third World Law Journal* 65 at 86.

³³ See par 2 3 2 1 - par 2 3 2 5 and accompanying footnotes (*infra*).

³⁴ Whereas Jean-Jacques Rousseau and Immanuel Kant saw the essence of the human capacity for reason as the ability to grasp the rational principles of morality, Thomas Hobbes and Jeremy Bentham understood rationality as the capacity to calculate the best means to an end that an individual wishes to achieve. In turn, John Locke and the contemporary liberal theorists John Rawls and Robert Nozick attempt to maintain a balance between the moral and instrumental aspects of rationality. See, in general, Thomas Hobbes *Leviathan* (1968) (New York: Penguin Books); John Locke "The Second Treatise of Government" in P Laslett (ed) *Two Treatise of Government* (1960) (Cambridge: Cambridge University Press); Hendrik van Eikema Hommes *Major Trends in the History of Legal Philosophy* (1979) (Amsterdam: North Holland Publishing Company) and Rowel Glen *Jurisprudence and Legal Theory Textbook* (1991) (revised and updated by KP Bampton). See also n 45 and n 46 (*infra*).

³⁵ See, in general, A Melden *Rights and Persons* (1977) (Oxford: Basil Blackwell).

³⁶ See, for example, Richard Fallon "What is Republicanism, and Is It Worth Reviving" 1989 102 *Harvard Law Review* 1695 and Stephen Gardbaum "Law, Politics and the Claims of Community" 1992 90 *Michigan Law Review* 685.

³⁷ On the question of individual interests, liberal theorists tend toward a general agreement on the probable objects of most individuals' desire. This agreement seems to result from two assumptions that underlie liberal thought, namely that each individual has desires and interests that - in principle - can be fulfilled separately from the desires and interests of others and the assumption that

motivation and rationality indicates a belief that human nature remains constant with the result that individual autonomy is seen as both universal and stable and not socially or culturally constituted.³⁹

Liberalism professes to protect the individual's freedom and autonomy by the endorsement of private rights on the basis of the human capacity for moral deliberation. Individual wants and desires are treated as pre-political constants, developed prior to - and in isolation from - the collective and political sphere.⁴⁰ To this end, a neutral attitude to the private (moral) life of the individual and the plural and competing conceptions which constitute it is adopted. Only minimal interference by the state and/or law is tolerated.⁴¹ Liberalism's belief in the ultimate worth of the individual is expressed in political egalitarianism: if all individuals have intrinsic and ultimate value, then their dignity must be reflected in political and legal institutions that do not subordinate any individual to the will or judgment of another.⁴² The good society - based on basic liberal values - must therefore protect the dignity of each individual⁴³ and promote individual autonomy and self-fulfilment. The state is the politically neutral institution that liberals charge with protecting persons and property and, simultaneously, guaranteeing the maximum opportunity for autonomy and self-fulfilment. In an attempt to delineate legitimate state intervention in the life of the individual, liberal theory distinguishes between so-called "public" and "private" realms. Whereas the public realm includes those aspects of life that may legitimately be regulated by the state, the state is thought to have no legitimate authority to

humans always inhabit an environment of relative scarcity with the result that the resources necessary to sustain life are always limited.

38 Michael Sandel "Introduction" in MJ Sandel (ed) *Liberalism and Its Critics* (1984) 6.

39 Allen Buchanan "Assessing the Communitarian Critique of Liberalism" 1988 - 1989 99 *Ethics* 852.

40 Fallon 1989 102 *Harvard Law Review* 1695 at 1700 (*supra*).

41 Buchanan 1988 - 1989 99 *Ethics* 852 (*supra*).

42 See, in general, Ronald Dworkin *Taking Rights Seriously* (1977) 172.

43 The dignity of the individual is thought to form the basis of the liberal conception of (individual) human rights: see Alan Gewirth "Human Dignity as the Basic Rights" in M Meyer and W Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (1992) 10. For an assessment of the value of human dignity in South African constitutional jurisprudence, see Chapter 6 of this dissertation par 6 4 3 2, especially par 6 4 3 2 1 - par 6 4 3 2 2 and accompanying footnotes (*infra*).

intervene in the private realm.⁴⁴ Conservative classical liberal theorists, for example, view the primary task of the liberal state to secure external defence, internal order and uphold the sanctity of contracts. The state charged with the preservation of individual freedom must merely fulfil the role of “night watchman”.⁴⁵ Contemporary liberals, however, assign much further-reaching functions to the state as it is expected to mitigate the worst effects of a modern market economy by providing a guarantee of a minimum standard of living and education.⁴⁶

Since liberal feminism is an extension of traditional liberalism, a critical assessment of the various theoretical premises of liberal feminist thought now follows.

2 3 2 A Critical Assessment of the Theoretical Tenets of Liberal Feminism

The core belief of liberal feminism is expressed in the argument that women - as individual rational beings - are entitled to the equal enjoyment of basic liberties and rights. It follows that women should be free to pursue their interests and “explore their full potential in equal competition with men”.⁴⁷ Since liberal feminism is grounded in the traditional liberal view of human beings as autonomous rational agents, it presupposes that physical characteristics such as race and sex are irrelevant to political theory. Male and female natures are thus deemed identical, for rationality and not physicality is emphasised. Liberal feminism thus accepts the liberal idea of creating a society which maximises individual autonomy, formal equality and equal opportunity for individual self-fulfilment.

In what follows directly below, I shall argue that at least five theoretical premises of liberal feminism are problematic. These problems, I believe, largely result from liberal feminism’s often uncritical endorsement (and at times even misunderstanding)⁴⁸ of fundamental liberal principles.

⁴⁴ See par 2 3 2 5 for both a discussion of the private realm and critique of the public/private distinction (*infra*). See also Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 1 and accompanying footnotes (*infra*).

⁴⁵ This theory of the state is still held by some contemporary liberals, notably Robert Nozick: see *Anarchy, State and Utopia* (1974) (Cambridge: Harvard University Press). See also Samuel Scheffler “National Rights, Equality and the Minimal State” 1976 6 *Canadian Journal of Philosophy* 59.

⁴⁶ This understanding of the role of the modern liberal state led John Rawls to formulate the theory of the welfare state as his conception of social justice: see *A Theory of Justice* (1971) (Cambridge: Harvard University Press).

⁴⁷ Valerie Bryson “Modern Liberal Feminism and its Critics” in *Feminist Political Theory: An Introduction* (1992) 159 (hereinafter referred to as *Feminist Political Theory*).

⁴⁸ See par 2 3 2 1 and accompanying footnotes (*infra*).

By accepting the basic assumptions of liberalism, liberal feminism shies away from confronting the relationship between state power and the status of women within a male dominated society. Unmodified liberal principles applied to the situation of women will therefore be hard pressed to provide an understanding of the nature and causes of women's oppression and are thus unlikely to provide a comprehensive strategy for ending it. Moreover, it will be argued below⁴⁹ that social and legal reform is only likely to succeed if it is based on an understanding of society's complex power structures and the interrelationship between "public" and "private" life. Consequently, a liberal feminist analysis will in all likelihood produce only a rather limited constitutional argument against adult heterosexual pornography.⁵⁰ The five theoretical premises of liberal feminism that raise particular problems when applied to the situation of women will now be discussed in turn.

2 3 2 1 The Liberal Feminist Position on the Role of the Law and the State

The demands that liberal feminism makes on the law and the state would seem to involve the use of these two institutional powers far beyond that envisaged in classical liberal theory.⁵¹ The liberal feminist demand for, *inter alia*, maternity benefits or child care facilities in the workplace opens the door to (and are indeed premised upon the idea of) state intervention in the private realm of the individual. Not only could these demands be seen to increase women's dependence on the state,⁵² but also to obscure the distinction between the private and public domain. It could therefore be argued that the liberal feminist call for increased state power stands in direct contradiction to the liberal ideals of individual autonomy and self-determination.

Yet liberal feminism does not seem to conceive of extensive state intervention in the private life

⁴⁹ See par 2 3 2 5 and accompanying footnotes (*infra*).

⁵⁰ See par 2 3 3 (*infra*).

⁵¹ Although liberal thought has moved away from its classic *laissez-faire* position towards a greater degree of state responsibility for economic and general social welfare, this trend has encountered opposition from American neo-liberals of the New Right: see Bryson *Feminist Political Theory* 159 at 165 (*supra*).

⁵² See, for example, A Borchorst and B Siim "Women and the Advanced Welfare State - A New Kind of Patriarchal Power?" in AS Sassoon (ed) *Women and the State: The Shifting Boundaries Between Public and Private* (1987) (London: Hutchinson); H Herness "The Welfare State, Citizenship and Scandinavian Women" in K Jones and A Jonasdottir (eds) *The Political Interests of Gender: Developing Theory and Research with a Human Face* (1988) (London: Sage); B Siim "Welfare State, Gender Politics and Equality Principles: Women's Citizenship in the Scandinavian Welfare State" in E Meehan and S Sevenhuijsen (eds) *Equality Principles and Politics* (1991) (London: Sage); and Carol Smart *Feminism and the Power of Law* (1989) (London: Routledge).

of individuals as a threat to individual freedom and autonomy. I would therefore argue that the liberal feminist view of state intervention as a means to individual freedom and self-determination rests upon a misunderstanding of the role of the liberal state for two reasons. First liberal feminism's conception of the role of the state involves an uncritical acceptance of the assumption that all competing groups have potentially equal access to state power. It secondly assumes that state power will be used impartially to facilitate equal treatment and thus promote justice and the general social good. This misunderstanding of the role of the state and the nature of state power means that liberal feminism can neither anticipate nor explain the failure of (or opposition to proposals for) legislative reforms. The reason for this can be attributed to the fact that even though the liberal feminist call for state intervention extends beyond conventional liberal thinking, liberal feminism still has no theoretical conception of the structural inequalities and vested interests that block women's progress in the (patriarchal) state. The mere pointing out of (social) injustices will not guarantee that the (economically and/or politically) powerful groups in society will make the necessary sacrifices and adjustments or surrender their public power and economic superiority in order to, for example, participate more fully in family life. In its fundamental misunderstanding of the role of the liberal state and the nature of state power lies the first theoretical flaw of liberal feminism.

2 3 2 2 The Liberal Conception of Human Nature

The liberal conception of the characteristics of human nature exposes a deep-rooted problem of liberal feminism, particularly in how it conceives human self-sufficiency, individualism and rationality.

It was pointed out above⁵³ that the liberal conception of human nature rests on the assumption that each human individual is essentially rational, independent, competitive and autonomous.⁵⁴ As the starting point of liberal political theory, this assumption seeks to determine what the circumstances might be in which essentially solitary individuals will agree to come together to constitute a civil authority, what might justify them in doing so, how conflict might be prevented and what these individuals might assent to as the basic principles governing their agreement. These questions have typically been answered with the help of various versions of the social contract theory which specify the interests that individuals have in civil society, namely the protection of life, civil liberties and property and limit the powers of association to fulfil these interests. Much of the credibility and endurance of the social contract theory derives from the

⁵³ See par 2 3 1 (*supra*).

⁵⁴ Jaggar describes the liberal idea of human nature "political solipsism" with the intent to show that the liberal view of individuals as independent, rational beings ignores human co-operation and mutual support: see "Liberal Feminism and Human Nature" in *Feminist Politics* 27 at 40 (*supra*).

assumption that individuals are essentially self-sufficient agents who only join civil authority to further their own interests.

Yet the idea of individual self-sufficiency is - at best - an unrealistic assumption about human nature. It ignores the co-operation, nurturing and mutual support that constitute an essential basis for human society and that have - at least historically - been central to women's lives. Therefore, the liberal assumption of individual self-sufficiency is plausible only if one ignores human (reproductive) interdependence.⁵⁵ This unrealistic assumption about human independence could - in turn - question the justification for establishing political or civil institutions designed to promote human well-being and fulfilment when juxtaposed with the liberal call for maximum freedom for individuals to define or interpret their own needs. Consequently, liberal theorists require that political institutions must be as neutral as possible about any particular conception of the good life or of what gives value to life.⁵⁶ Yet this very requirement can be seen to constitute a withdrawal from the most fundamental problems that confront political philosophy, namely the basic needs of human beings as a biological species. By ignoring the common biological constitution of humans, an important avenue for determining objective criteria of human need remains unexplored by liberal political theory. Contrary to the impression created by liberal thinking, these concerns are far from irrelevant and should in fact serve as the starting point of any political philosophy.

To its credit, liberal feminism does at least provide an *implicit* challenge to the liberal assumption that the essential human characteristics are properties of individuals and are formed independently of any particular social context. Liberal feminism does challenge this assumption by highlighting the role social context plays in the cognitive and emotional differences between the sexes.⁵⁷ It follows, therefore, that liberal feminism does not see human nature as a pre-political given. The challenge developed by liberal feminists seems to rightly suggest that the conception of individuals outside of a social context is logically as well as empirically impossible.

⁵⁵ See Carol Pateman "The Theoretical Subversiveness of Feminism" in C Pateman and E Gross (eds) *Feminist Challenges: Social and Political Theory* (1986) (London: Allen and Unwin) (hereinafter referred to as *Feminist Challenges*). See also E Wolgast *Equality and the Rights of Women* (1980) (London: Cornell University Press).

⁵⁶ See Ronald Dworkin "Liberalism" in S Hampshire (ed) *Public and Private Morality* (1978) at 127 who argues that since the citizens of a society differ in their conceptions, the state does not treat them as equals if it prefers one conception to another. See also par 2 3 1 n 42 (*supra*).

⁵⁷ These cognitive and emotional differences are based on Carol Gilligan's argument that men and women differ in their moral reasoning due to a distinctly different moral development: see par 2 2 1 n 28 (*supra*).

The liberal feminist challenge to abstract individualism has profound consequences for liberal political theory. By undercutting the liberal conceptions of freedom (as non-interference), equality and the presumption that individuals have certain fixed interests (thereby invalidating the liberal justification of the state), liberal feminism rightly concludes that political philosophy must rely on a much closer examination of actual social conditions. Liberal feminism therefore seems willing to challenge the inherent male-bias of the liberal conception of human nature. The excessive value which the liberal paradigm places on rationality at the expense of physicality also poses direct problems for women, since, in traditional Western philosophy, women have consistently been looked at in terms of their reproductive capacities and sexuality. The association of women with the physical and men with the rational has obvious implications for women's demand for basic human rights. Moreover, the liberal idea of abstract individualism could also be said to generate inadequate conceptions of freedom and equality. The liberal conception of equality awards equal rights to every rational individual regardless of race, sex or even class. Although this understanding of equal rights appears to be progressive, it actually gives rise to serious drawbacks. These drawbacks are twofold. First, a theory of women's oppression needs to realise that human beings are not abstract individuals but experience actual differences in power, sex, race and class. Secondly, the liberal insistence on formal equality (which will be discussed below)⁵⁸ invokes a male standard which largely ignores the actual (and unique) social, legal and political (or material) conditions and realities of women as an oppressed class.

The third related theoretical aspect in which the liberal idea of human nature is problematic, namely its conception of rationality, will be explored in the next paragraph.

2 3 2 3 The Liberal Conception of (Human) Reason

There are a number of interrelated aspects of the liberal conception of reason that I find problematic. I regard the liberal conception of reason as inherently male-biased and prejudicial to women, thus falling short of facilitating a basis for substantive legal and political change.

Liberal feminists have been forced to frame their arguments for the equal treatment of women in terms of women's full capacity for reason by virtue of the fact that liberalism awards basic civil and political rights to individuals on the basis of their rational capacity. This strategy is problematic for various reasons. Historically, the liberal concept of reason is based on the experiences and perceptions of men.⁵⁹ For centuries "reason" has been equated with the male

⁵⁸ See par 2 3 2 4 (*infra*).

⁵⁹ See R Braidotti "Ethics Revisited: Women and/in Philosophy" in C Pateman and E Gross (eds) *Feminist Challenges* at 48 (*supra*).

in Western legal and political thought and consequently the terms of political debate have been laid down by male theorists.⁶⁰ Since “reason” as a concept cannot be “disembodied”, it is not a gender neutral concept in Western philosophical thought as is commonly supposed by liberal feminism.⁶¹ The liberal claim that reason is both objective and universal must therefore be questioned, particularly since Western philosophy has defined reason in terms of overcoming “nature” and “emotion” which have traditionally been construed as essentially female. Consequently, the feminine has become associated with that which rational knowledge and understanding transcends. Liberal feminism’s attempts to show that women are fully rational agents therefore essentially means that only by denying the peculiarity of their sexual/gender identity women are allowed participation in the male (rational) world of politics, philosophy and science.⁶² Liberal feminism’s eagerness to satisfy inherently biased criteria has effectively erased the centrality of gender, sex and sexuality in their account of women’s (legal and political) oppression. This failure can actually serve to perpetuate injustice to women under the pretext that equality is merely a matter of satisfying a demand for equal treatment of the sexes.⁶³ Moreover, liberal feminism also ignores the relationship between gender identity and patriarchal power. Since liberal feminism directs its focus only at reason as a prerequisite to basic rights and liberties, male domination and power as a barrier to (substantive) equality is completely overlooked.

By stressing the dichotomy between reason and intuition, liberal feminism could actually pave the way for the suggestion that reason and logic are (inherently) strange to a feminist epistemology. Instead of highlighting the female modes of knowledge and underlining their importance as envisaged by the liberal feminist conception of a distinctly female point of view,⁶⁴ the suggestion that reason and logic are unfamiliar to feminist method and knowledge could

⁶⁰ See Carol Smart “The Quest for a Feminist Jurisprudence” in *Feminism and the Power of Law* (1989) 66 at 86.

⁶¹ See, in particular, Pateman “Review of Genevieve Lloyd’s *The Man of Reason*” 1986 14 *Political Theory*. This critique of human rationality was first articulated by Genevieve Lloyd in her groundbreaking work *The Man of Reason: “Male” and “Female” in Western Philosophy* (1984) (London: Methuen).

⁶² See, for example, Catharine MacKinnon who argues that since men have defined women as different *to the extent that they are female*, it would appear that women can be entitled to equal treatment only to the extent that they are *not* women: see “Reflections on Sex Equality under Law” 1991 100 *Yale Law Journal* 1281 at 1287. See also par 2 3 2 4 n 73 (*infra*).

⁶³ See par 2 3 2 4 (*infra*).

⁶⁴ See par 2 2 1 n 28 (*supra*).

actually perpetuate the discrimination and domination to which women have been subjected.⁶⁵ This could very well undermine the transformative potential of feminism, because such a view still confines women to womanhood.⁶⁶ It is also questionable whether the affirmation of differences in knowledge and method could be politically useful to the feminist cause. It could open the door to the kind of moral reasoning which allows women to claim as their own the very qualities (and consequences) that male supremacy, to its own advantage, has projected upon them.⁶⁷ To the extent that women are different, liberal feminism must guard against constructing their difference in a way that could be detrimental to the advancement of women and a feminist epistemology.

2 3 2 4 The Liberal Conception of (Gender) Equality

The liberal conception of equality appears to run into immediate difficulties when it is made to apply to women. Since the said conception is based on the Aristotlean idea of equality,⁶⁸ the liberal understanding of equality accepts the proposition that “those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness. Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.”⁶⁹

Aristotle’s concept of equality provides various obstacles when applied to instances of discrimination based on gender or sex. The difficulty with the proposition that alikes should be treated alike is that it provides no guidance in respect of the determination of which things are alike and therefore equal for purposes of determining discrimination. The claim that equals shall be treated equally does not define who equals are. Therefore, the Aristotlean conception of equality in fact turns on a prior question, namely a pre-understood establishment of which persons are in fact equal for the purposes of the enquiry.⁷⁰ This has led the Supreme Court of the

⁶⁵ See Katherine Bartlett “Feminist Legal Methods” in KT Bartlett and R Kennedy (eds) *Feminist Legal Theory* 370 (*supra*).

⁶⁶ See Scales “The Emergence of Feminist Jurisprudence: An Essay” 1986 *Yale Law Journal* 1373 at 1380.

⁶⁷ See Deborah Rhode “Feminist Critical Theories” in 1991 Bartlett and Kennedy (eds) *Feminist Legal Theory* 15 at 333 (*supra*).

⁶⁸ See Peter Westen “The Empty Idea of Equality” 1982 95 *Harvard Law Review* 537 at 543.

⁶⁹ See Dennis Davis (quoting from Aristotle’s *Ethica Nichomacea* Book V 3 at 1131a - 1131b) “Equality and Equal Protection” in D van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (1996) 196 at 197.

⁷⁰ See Westen 1982 95 *Harvard Law Review* 537 at 543 (*supra*).

United States to adopt the so-called “similarly situated” test.⁷¹ When a female complainant alleges discrimination she does not only have to accept the assumption that men and women are similarly situated, but also has to show that there is a male who has received more favourable treatment. But given the vertical and horizontal gender divisions that exist in, for example, the labour market, a female employee will often not be able to point to any existing male comparator to prove discrimination.⁷² Adherence to the liberal conception of equality therefore means that only those few women who are in the unusual position of being similarly situated to men can benefit from measures designed to eradicate discrimination. As Catharine MacKinnon states:

“[t]he more unequal a society gets, the fewer such women are permitted to exist. Therefore, the more unequal society gets, the *less* likely the difference doctrine (for example, anti-discrimination legislation) is likely to be able to do anything about it.”⁷³

The problems experienced by liberal feminism with regard to equality theory would seem to be the inevitable consequences of a value system which ignores the (unequal) power relations between the sexes.⁷⁴ It makes no sense for equality doctrine to require women to be the “same” as socially and politically advantaged men in order to qualify for equal treatment. Apart from the fact that the liberal idea of equality ignores the social reality of women which consists of systematic deprivation of power and resources, the failure of this idea to take account of sexual difference is highly problematic in a legal context. Liberal feminism’s aspirations to compete on strictly equal terms with men has caused it to view any recognition of (sexual) difference as an admission of inferiority or as a reduction of womanhood to biological functions. This theoretical position does not allow for the ways in which the law has maintained and constructed the disadvantage of women to be questioned. It also does not allow for an examination of the extent to which the law is male-defined and built on male conceptions and interests. When women are compared to men, their opportunity to be treated as equals is therefore unavoidably limited to the extent of their likeness to men. The way in which similarity is measured is problematic. This defect in the liberal model becomes particularly acute in instances where an

⁷¹ See, for example, *Rostker v Goldberg* 453 US 57 (1981).

⁷² See, in particular, Catherine O’Regan “Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-Discrimination Legislation” in C Murray (ed) *Gender and the New South African Legal Order* (1994) 64 at 69 (hereinafter referred to as *Gender*).

⁷³ MacKinnon “Difference and Dominance: On Sex Discrimination” in *Feminism Unmodified: Discourses on Life and Law* (1987) 32 at 37 - 38 (hereinafter referred to as *Feminism Unmodified*). Emphasis in the original.

⁷⁴ See MacKinnon *Feminism Unmodified* 32 at 37 - 38 (*supra*). On the significance of this in a discourse on the constitutional implications of adult heterosexual pornography, see Chapter 5 of this dissertation par 5 5, especially par 5 5 1 - par 5 5 2 and accompanying footnotes (*infra*).

infringement of equality arises from female-specific circumstances. It consequently becomes difficult to treat sexual assault, sexual harassment in the workplace, rape and pornography as issues of sex equality because men experience no comparable disadvantage or need. And if the similarly situated test cannot be met, there exists theoretically no legal basis for complaint. Moreover, when equality is understood according to the liberal model, the assumption is that equality is the norm and that - from time to time - autonomous individuals are discriminated against. This means that systemic, persistent (group) disadvantage is not contemplated. The Aristotlean model is incapable of identifying systematic discrimination because it assumes a universalistic, gender-neutral approach that fails to recognise that institutional structures may impact differently on women as opposed to men. This model of equality is thus more likely to perpetuate rather than eradicate inequality.⁷⁵

There seems to be little room for optimism that the liberal idea of equality can overcome its limitations and reconcile the reality of different needs with the ideal of free and open competition. Liberal feminism seems to be unable to redress the shortcomings inherent in a liberal conception of equality because it accepts the necessity of an individualistic, hierarchal competitive society.

2 3 2 5 **The Liberal Distinction Between the Private and Public Sphere**

The distinction between the private and the public realm in liberal legal and political theory raises its own particular problems for women. Since liberal theorists define the areas of sexuality, child bearing and rearing as belonging to the private sphere (because these activities have been conceived as natural or biologically determined) the failure to consider the possibility that the private and public worlds may in some way be connected or that the private realm may in fact

⁷⁵

See Albertyn and Kentridge 1994 10 *SAJHR* 149 at 152 - 153 (*supra*). As a result of broad dissatisfaction with the Aristotlean conception of equality, Canadian jurisprudence favours a more context-based approach which is sensitive to the actual social circumstances of individuals or groups. Since the South African Constitutional Court relies heavily on Canadian equality jurisprudence, the Canadian conception of equality will be fully assessed in Chapter 6 of this dissertation where specific constitutional arguments against adult heterosexual pornography will be explored. For a feminist discussion of Canadian equality jurisprudence, see Kathleen Mahoney "Canadian Approaches to Equality Rights and Gender Equity in the Courts" in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 435 and "The Constitutional Law of Equality in Canada" 1992 24(2) *New York University Journal of International Law and Politics* 759. See also *Mahe v The Queen* (1988) 42 DLR (4th) 514; *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1; and *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC).

be the site of sexual politics or oppression,⁷⁶ constitutes one of liberal feminism's biggest drawbacks. Liberal feminism has as a result largely failed to come to terms with the ways in which the domestic division of labour spills over into public life and the vested interests men may have in maintaining this division. As a political theory, liberal feminism seems to lack the ability to conceptualise the possibility that family life may be an institution that oppresses and exploits women physically, emotionally and sexually. It also seems to be incapable of conceptualising the ways in which sexuality and sexual experiences are related to the dominant structures of patriarchal power. As a result, domestic violence is rendered invisible, rape becomes an unfortunate (and random) personal experience⁷⁷ and sexual activity, including family planning, reproduction and the use of sexually explicit material are simply matters of individual, private choice. The liberal concept of a private area of life free from power struggle and political interference therefore poses obvious problems for a theory of women's liberation. The liberal understanding of a private realm is far removed from the radical feminist argument (which will be considered below)⁷⁸ that all existing social institutions and relationships - whether private or public - are part of a patriarchal power struggle.⁷⁹

2 3 3 The Suitability of Liberal Feminism as Theoretical Framework in Formulating a Constitutional Response to Adult Heterosexual Pornography

Although no political theory which seeks to address the situation of women can be satisfactory in all aspects, the liberal conception of women's oppression seems to produce quite a number of interrelated problems. It was argued in the previous paragraphs⁸⁰ that the liberal paradigm is based on an incomplete (and biased) view of human nature with the result that it cannot provide

⁷⁶ See, *inter alia*, Pateman "Feminist Critiques of the Public/Private Dichotomy" in A Phillips (ed) *Feminism and Equality* (1987) at 118 and Allison Morris 'International reform initiatives regarding violence against women: successes and pitfalls' in S Jagwanth et al *Women and the Law* 351 at 352 (*supra*). See also Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 1 and accompanying footnotes (*infra*).

⁷⁷ See Victoria Bronstein "The Rape Complainant in Court: An Analysis of Legal Discourse" in C Murray (ed) *Gender* 202 - 227 (*supra*).

⁷⁸ See par 2 4 (*infra*).

⁷⁹ The radical feminist attack on the private/public distinction is not an attack on privacy as an ideal, nor does it advocate political involvement in personal and family life. Radical feminists simply seem to claim that the relations of family are political and should not be: see, for example, Z Eisenstein *Feminism and Sexual Equality* (1984) at 215. But compare Sheldon Wolin "Collective Identity and Constitutional Power" in G Bryner and D Thompson (eds) *The Constitution and the Regulation of Society* (1988) 93 at 113 - 115.

⁸⁰ See par 2 3 2, especially par 2 3 2 1 - par 2 3 2 5 (*supra*).

an adequate understanding of human motivation and behaviour. The liberal paradigm thus seems unable to predict political and/or legal outcomes or to provide a workable strategy for women's liberation. In employing male experiences as the (legal) norm, liberal feminism imposes particular goals and standards upon women under a universal guise. It requires women to conform to the male standard rather than to highlight the unique predicament faced by women as a group.⁸¹ Even if the values and priorities of liberal feminism are accepted, its failure to address society's power relations in both the private and public realm can have serious legal and political consequences. It need not be argued that society's power relations and reproductive or domestic needs will not simply vanish once it is recognised that women have a right to fulfil themselves in other roles. Therefore, the liberation of women from domesticity - a cause for which liberal feminism fought long and hard⁸² - still leaves the question of child care and domestic responsibilities unanswered. The liberal feminist proposals of flexible work arrangements or even greater male involvement in the rearing of children and/or domestic tasks create problems in themselves, for it remains difficult to see why a free-market system should accommodate these changes or why a majority of men should willingly embrace activities which feminists have seen as inherently unfulfilling.

The possibility also exists that the individualistic assumptions of liberalism may pose difficulties for a feminist political theory based on the recognition of shared gender interests. The liberal belief that it is up to each person to make the best of his/her own life stands in direct opposition to feminism's awareness of group disadvantage and the need for collective action. This dichotomy lies at the very heart of liberal feminism.

The major theoretical problems of the liberal feminist conception of women's subordination thus seems to be closely related to the liberal understanding of human nature and rationality which - as I have argued⁸³ - are male-biased. Liberal feminism is therefore ill-suited to constitute the philosophical foundation for a comprehensive theory of women's liberation. I therefore submit that a theory which centralises gender, sex and sexuality (instead of underplaying them) within a social context of male domination, is not only better suited to facilitate legal and doctrinal reform, but is capable also of facilitating a comprehensive (constitutional) critique of adult heterosexual pornography.

⁸¹ This could of course simply be the result of what MacKinnon calls "male supremacist jurisprudence" which erects qualities valued by men to serve as standards for, *inter alia*, judicial review, norms of judicial restraint, reliance on precedent, separation of powers and the division between public and private law: see "Toward a Feminist Jurisprudence" in P Smith (ed) *Feminist Jurisprudence* 610 at 611 (*supra*).

⁸² See par 2 2 1 n 22 (*supra*).

⁸³ See par 2 3 2 2 and par 2 3 2 3 and accompanying footnotes (*supra*).

One unique feature of the South African Constitution does, however, open up the possibility of framing an argument against pornography within the ambit of the larger liberal paradigm. Here I am referring to the prohibition of so-called hate speech contained in section 16(2) of the South African Constitution. Section 16(2)(c) provides that the right to freedom of expression does not extend to the “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”⁸⁴ As an extension of the liberal tradition, liberal feminism would naturally seek to prioritise basic individual liberties, notably the right to freedom of speech and expression which is typically seen to underpin a democratic social, political and legal order based on individual autonomy and fundamental human rights. In their *amici curiae* brief,⁸⁵ Nan Hunter and Sylvia Law indeed argued forcefully in favour of the protection of what they referred to as “sexual expression” or “sexually explicit speech.”⁸⁶ They argued that any curtailment of these modes of speech would be detrimental to women by, *inter alia*, infringing upon women’s capacity to voluntarily agree to participate in the creation of sexually explicit images.⁸⁷ In step with United States First Amendment jurisprudence they concluded that pornography constitutes constitutionally protected speech, thereby prioritising individual autonomy and freedom.

From this it follows that an argument against pornography within a liberal feminist framework would have to proceed from an understanding of pornography as a particular mode of expression. Sexually explicit speech would not *per se* be deemed sexist or harmful to women, because mere images are not understood to have the capacity to cause harm. Accordingly, to justify legal intervention, harm must either be direct or must constitute the advocacy of hatred that constitutes incitement to cause harm. Seen in this context, liberal feminism could accommodate an argument against pornography which conceptualises it as a violent mode of expression that constitutes “hate speech”. It thus becomes possible to formulate an argument against a limited

⁸⁴ For the full wording of section 16 of Act 108 of 1996, see Chapter 1 of this dissertation par 1.1 n 18 (*supra*). See also Chapter 6 of this dissertation par 6.4.2.2 (*infra*).

⁸⁵ This *amici curiae* brief resulted from an appeal against the decision of the Circuit Court (Seventh Division) which declared the feminist anti-pornography ordinance enacted by the city council of Indianapolis unconstitutional as a violation of the First Amendment of the United States Constitution: see *American Booksellers Association v Hudnut* 771 F2d 323 (1985). For a comprehensive discussion of the circumstances leading to this ordinance, the court’s decision as well as the *amici curiae* arguments, see Chapter 3 of this dissertation (*infra*).

⁸⁶ See “Brief *Amici Curiae* of Feminist Anti-Censorship Task Force et al in *American Bookseller’s Association v Hudnut*” in P Smith (ed) *Feminist Jurisprudence* at 467 - 481 (*supra*). See also Hunter and Law 1987 - 1988 21 *University of Michigan Journal of Law Reform* 69.

⁸⁷ See (1993) 467 at 472 (*supra*).

category of pornographic material within the ambit of the right to freedom of expression entrenched in section 16 of the South African Constitution. This argument can be formulated as follows:

*A particular category of adult heterosexual pornographic material constitutes the advocacy of hatred that is based on gender and that constitutes incitement to cause harm which can reasonably and justifiably be prohibited under section 16(2)(c) and section 36 of the Bill of Rights of the South African Constitution.*⁸⁸

As suggested in the first chapter of this dissertation,⁸⁹ the foregoing argument will be explored as an *alternative* constitutional argument against adult heterosexual pornography. Since I intend to utilize a radical feminist framework for the primary constitutional argument against pornography, a discussion of the main tenets of radical feminist thought now follows. The discussion which is to follow will, however, be limited to a critical assessment of the radical feminist theory of patriarchy and two structures of patriarchal power, namely the state and sexuality.

2 4 RADICAL FEMINIST THOUGHT

In view of the fact that radical feminism is a product of the women's liberation movement of the 1960s and part of a grass-roots movement, its insights into women's subordination derive from various traditions. As a political theory, it constitutes a fundamental challenge to traditional liberal and Marxist (political) theory. Radical feminism developed a parallel argument to the Marxist idea of the economic class struggle⁹⁰ in that it sees sexuality - and not labour - as the

⁸⁸ As indicated in the preceding chapter, this limited constitutional argument against adult heterosexual pornography will be assessed in Chapter 6 of this dissertation (*infra*): see Chapter 1 of this dissertation par 1 2 3 and accompanying footnotes (*supra*).

⁸⁹ See Chapter 1 of this dissertation par 1 2 1 and par 1 2 2 (*supra*).

⁹⁰ Marxist (and socialist) feminists do not view the construction of gender as the primary issue, but regard the introduction of capitalism and private property as the origin of the oppression of women instead. To relieve this oppression, Marxist and socialist feminist argue that the capitalist free market system must be replaced with a socialist system in which no class will be economically dependent, marginalised and exploited by any other: see, in general, Smith "Introduction" in P Smith (ed) *Feminist Jurisprudence* (1993) 3 at 5 - 6; Judith Stacey and Barrie Thorne "The Missing Feminist Revolution in Sociology" in KA Myers et al *Feminist Foundations: Toward Transforming Sociology* (1989) 219 at 228 - 229; and Evelyn Reed "Women: Caste, Class, or Oppressed Sex" in AM Jaggar and PS Rothenberg (eds) *Feminist Frameworks: Alternative Theoretical Accounts of the Relations between Women and Men* (1993) 170 - 173.

driving force behind social arrangements. Sexuality is indeed seen as the “social process through which social relations of gender are created, organized, expressed, and directed, creating the social beings we know as women and men”.⁹¹

As a political theory, radical feminism seeks to give an account of the social reality of women under a pervasive system of male domination. The most important insights of radical feminism are gained from women’s own experiences and perceptions of oppression and sexual domination.⁹² Radical feminism does not, therefore, assimilate women’s needs and experiences into a pre-existing theory with the result that women’s understanding of subordination forms the basis of a woman-centred understanding of the world of which a centrally shared experience is oppression and domination by men. This unique feature of radical feminism has generated a variety of theories and insights about women’s oppression which are grounded in a common political practice and shared assumptions about human nature and social reality.⁹³

The most profound insight of radical feminism is that distinctions of gender, based on sex, structure virtually every aspect of our lives. These distinctions constitute an all-pervasive and unchallenged feature of our social reality and therefore structure our entire social organization. Consequently, radical feminism employs gender to construct a comprehensive critique of women’s oppression. Since gender is seen as a social system that divides power, it is political.⁹⁴ Gender is both the way in which women are socially differentiated from and subordinated to men.⁹⁵ For radical feminism the problem of women’s oppression is therefore seen to be situated in both gender and sex.⁹⁶

⁹¹ MacKinnon “The Problem of Marxism and Feminism” in *Feminist Theory* (1989) 3 (*supra*). In radical feminist thinking, these are thought to constitute the material conditions of the oppression of women as a class.

⁹² See “Privacy v Equality: Beyond Roe v Wade” in *Feminism Unmodified*: (1987) 93 at 94 (*supra*).

⁹³ See Jaggar *Feminist Politics* (1988) 85 at 85 (*supra*).

⁹⁴ See, in particular, MacKinnon who draws on Kate Millett’s definition of gender relationships as politically powered structured relationships in “The Liberal State” in *Feminist Theory* (1989) 157 at 160 (*supra*)

⁹⁵ Since gender is central to women’s oppression, radical feminists initially sought the elimination of all social distinctions between the sexes. Androgyny was suggested to eliminate male dominance and male gender privilege. The objective was to “annihilate sex roles”: see “A Political Organization to Annihilate Sex Roles” in A Koedt et al *Radical Feminism* (1973) at 370. The call for androgyny has since however been abandoned by radical feminism as an inappropriate political objective.

⁹⁶ On the significance of this, see par 2 4 2, especially par 2 4 2 2 - par 2 4 2 3 and accompanying footnotes (*infra*).

Since the dialectical conception of the relation between human nature and human society could be said to challenge the conceptual distinction between sex and gender, the sex/gender distinction becomes blurred in radical feminist theory. By acknowledging that human biology (including human sexual biology) is not only partly created by society but that society also responds to human biology, radical feminism challenges earlier feminist thinking that conceptualised sex as a set of fixed biological characteristics and gender as the social attribute of being masculine or feminine. Radical feminism thus views sexuality as fundamental to gender and biology as its social meaning in the system of sex inequality.⁹⁷ Since sex is a social and political system that does not rest independently on biological differences, sex is relevant to gender because it is itself partly created by gender.⁹⁸ Radical feminism thus questions both sex and gender because these are conceived as dialectically and inseparably interrelated.

The oppression of women is therefore viewed as the most fundamental and universal form of domination under patriarchy.⁹⁹ Since the relationship between men and women is conceived to be based on power, it is political in nature. This power takes the form of male domination of women in all areas of life. Consequently, no aspect of life lacks a political dimension. Moreover, radical feminism believes that male power is not confined to the "public" worlds of politics and employment, but that it extends into private life. Since male domination is so pervasive, it is present in the state, economic system, family, human reproduction, language, knowledge, sexuality and sexual violence, all of which are seen as structures of patriarchy.¹⁰⁰ Patriarchy is therefore seen to rest upon the use or threat of force. Sexual relations between men and women are thus understood as expressions of male power. Radical feminism therefore challenges traditional concepts of power and politics and extends these to family and personal relationships as well as sexuality. Patriarchy is maintained by the process of conditioning¹⁰¹

⁹⁷ See MacKinnon in "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" 1983 8 *Signs: Journal of Women in Culture and Society* 635 n 1.

⁹⁸ See Jaggar *Feminist Politics* 83 at 112 (*supra*).

⁹⁹ The key concept of patriarchy was first introduced into modern feminist thought by Kate Millett. She found that patriarchy was central to seventeenth century debates over the extent of monarchical power where supporters of absolute rule claimed that the power of a king over his subjects was the same as that of a *paterfamilias* over his family. Both were thought to be sanctioned by God and nature. This discovery led her to formulate one of the most basic arguments of radical feminism, namely that in all known societies the relationship between men and women has been based on power: see *Sexual Politics* (1970) (London: Virago Press Ltd); (1985) at 25.

¹⁰⁰ See Bryson "Modern Radical Feminism: Knowledge, Language and Patriarchy" in *Feminist Political Theory* at 222 - 231 (*supra*).

¹⁰¹ See MacKinnon 1991 100 *Yale Law Journal* 1281 at 1303 (*supra*).

through childhood socialisation, education, literature, religion, etc. The result is sexual domination which is so universal, ubiquitous and complete that it appears natural and hence becomes invisible. Radical feminism thus sees it as its task to both expose pervasive male domination and to analyse how it is maintained in order to successfully challenge it.

The radical feminist conception of women's oppression is not, however, without problems. Since at least four aspects of the radical feminist theory of patriarchy could be challenged, I shall next conduct a closer inspection of the theory of patriarchy.

2 4 1 The Radical Feminist Theory of Patriarchy

The radical feminist theory of patriarchy can be challenged on four interrelated points. First, it could be argued that the radical feminist theory of patriarchy is descriptive rather than analytical and thus unable to explain the origins of male power. This seems to render it unable to provide an adequate strategy for ending patriarchal domination. Secondly, it could be argued that radical feminism propagates the idea of "man as the enemy" through its conception of male domination which - if drawn to its logical conclusion - can lead only to lesbian separatism.¹⁰² Thirdly, it could be argued that radical feminist theory is ahistorical and therefore encourages an equally ahistorical conception of male domination. The final interrelated point on which the radical feminist theory of patriarchy could be challenged is that it conceptualises women as passive victims, unable to secure liberation from a comprehensive (and virtually perfected) system of sexual oppression.¹⁰³ In what follows next, I shall address these four interrelated problems in order to ascertain whether they present insurmountable theoretical obstacles to radical feminism within the broader context of the present study.

The claim that the radical feminist theory of patriarchy is descriptive rather than analytical could be met with three counter-arguments. First, it could be argued that the focus of such a claim is somewhat misplaced. Surely the objectives of a sophisticated theory based in women's own experiences and the reality of their oppression and (sexual) domination should instead be to identify and understand the structures and institutions that maintain (patriarchal) dominance so as to facilitate substantive change. Secondly, it could be argued that a search for the origins of male domination is bound to be unsuccessful for the simple reason that women's subordination

¹⁰² See, in general, Esther Newton and Shirley Walton "The Misunderstanding" in CS Vance (ed) *Pleasure and Danger* 149 (*supra*).

¹⁰³ See, in particular, Drucilla Cornell "Gender, Sex and Equivalent Rights" in J Butler and J Scott (eds) *Feminists Theorize the Political* (1992) 280 - 296 and "Sexual Difference, the Feminine, and Equivalency" in *Transformations: Recollective Imagination and Sexual Difference* (1993) 112 (hereinafter referred to as *Transformations*).

is not a single phenomenon. Lastly, a search for origins also runs the risk of obfuscating the reality (and often extreme consequence) of male power.

The radical feminist theory of patriarchy also does not - to my mind - necessarily imply that all individual men oppress women. The central message of radical feminism must be understood correctly, namely that men as a class have interests as opposed to women as a class. This view of society in which men and women are conceived as opposing classes has at least two advantages. First, it could serve to highlight entrenched structures of male domination. Since male power in all its manifestations is the central issue, radical feminism sees male power as socially constructed rather than embodied in individual (biological) males. Secondly, the radical feminist view of society has the advantage of emphasising that the subordination of women is not a natural phenomenon and that men - as a class - derive benefits from it. This does not, however, justify the claim that radical feminism is incapable of acknowledging that individual men may be unequal in relation to each other in the measure of control that they are able to exert over their own lives and the lives of women.¹⁰⁴

It follows, therefore, that the radical feminist theory of patriarchy does not necessarily go hand in hand with separatist ideas. Since radical feminism sees male power as analytically distinct from individual male persons, man-hating and lesbian separatism are not inherent in the radical feminist concept of patriarchy. Separatist ideas must therefore be disentangled from the original conception of patriarchy which implies neither that differences between the sexes are biologically determined nor that they are in principle unresolvable. One must therefore guard against what could be seen as an oversimplification and/or misinterpretation of the radical feminist theory of patriarchy.

The argument that radical feminism is based on a false universalism is, however, more complex and merits careful consideration. I support - in principle - the argument that it is important to guard against cultural imperialism where concerns of middle-class Western women are equated with the experiences of all women. In an ethnically and culturally diverse country such as South Africa it would be unwise - possibly even presumptuous - to equate the experiences of white (mostly) middle-class women with the multi-layered oppression which black women have suffered and continue to suffer. Radical feminist arguments based on a common women's experience seem to emanate from attempts to discover what it is about human biology that

104

This acknowledgement indeed found expression in the radical feminist anti-pornography ordinance for the City of Minneapolis where the use of transsexuals in the place of women in sexually explicit depictions was deemed to constitute pornography for purposes of the ordinance: see section 139.20 subsection (gg)(2) Amending Title 7 Chapter 139 of the Minneapolis Code of Ordinances Relating to Civil Rights of 1983. See also Chapter 3 of this dissertation par 3 5 1 1 and accompanying footnotes (*infra*).

enables men to dominate women. Radical feminism endeavours to answer this question without reference to any historical context, thereby implying that human biology is unchanging - a fixed pre-social given. This leads radical feminists to conceptualise sex in an ahistorical manner which - in turn - encourages them to develop an equally ahistorical conception of male domination.¹⁰⁵

It was pointed out above¹⁰⁶ that patriarchy is conceptualised in radical feminist theory as a universal system of male domination. To conceptualise patriarchy in this way implies that male domination is a transhistorical social structure. This conception can be problematic in that it may result in an oversimplification of the complexity of women's experience of domination and for that reason the experiences of both sexes. If radical feminism views patriarchy in abstraction from the specific social practices through which men dominate women, it will inevitably produce superficial generalisations about women and women's oppression. It was already pointed out earlier in this paragraph that generalisations about women's subordination invariably lead to a search for the origins of subordination - a search which is bound to be unsuccessful for the very reason that women's subordination is not a single phenomenon. The search for the origins of women's subordination would seem to be premised upon the belief that human beings and their social arrangements are something other than products of history.¹⁰⁷ It would also seem to suggest that our gender systems are primordial, transhistorical and essentially unchanging.¹⁰⁸ Therefore, the quest for the origins of women's subordination is not only premised upon universalism but can indeed be seen to sustain universalism. And universalism - in turn - could permit the dangerous assumption that the sociological significance of what individual people do constitutes what they are in biological terms.¹⁰⁹

¹⁰⁵ Andrea Dworkin, for example, expressly works on the assumption of a sameness in women's oppression which transcends differences in time and culture. She argues that the way in which this oppression finds expression in rape, battery, incest and prostitution is testament to its ahistorical character: see "Against the Male Flood: Censorship, Pornography and Equality" in C Itzin (ed) *Pornography* 515 at 526 (*supra*). See also, in general, *Women Hating* (1974) (New York: EP Dutton) and Mary Daly *Beyond God the Father: Towards a Philosophy of Women's Liberation* (1973) (Boston: Beacon Press) (hereinafter referred to as *Beyond God the Father*) and *Gyn/Ecology: The Metaethics of Radical Feminism* (1978) (Boston: Beacon Press) (hereinafter referred to as *Gyn/Ecology*).

¹⁰⁶ See par 2 4 (*supra*).

¹⁰⁷ See Gale Rubin "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in CS Vance (ed) *Pleasure and Danger* 267 at 276 (*supra*).

¹⁰⁸ (1992) 762 at 275 (*supra*).

¹⁰⁹ See MZ Rosaldo "The Use and Abuse of Anthropology: Reflections on Feminism and Cross-Cultural Understanding" 1980 5(3) *Signs: Journal of Women in Culture and Society* 394 at 392 - 393.

Still, the acknowledgment that women's subordination is not a single (unchanging) phenomenon does not constitute a denial of the radical feminist claim that men dominate women universally. It does point out, though, that men do so through a variety of social structures which vary both across (and sometimes even within) cultures. The universality of male dominance is not, therefore, brought into question by the argument that the structures of patriarchy are interrelated or by the acknowledgement that men - as well as women - have varying degrees of power, either individually or as a group.¹¹⁰ But the radical feminist emphasis on the universality of women's experiences could encourage (or be construed as) an oversimplification of women's oppression and thus neglect the fact that certain differences in the position of women in different cultural contexts may be quite significant, particularly from a feminist perspective.¹¹¹

The final problem raised in regard to the radical feminist theory of patriarchy, namely that it conceptualises women as passive victims of sexual oppression seems premised upon an understanding of patriarchy as an unchangeable "web of oppression".¹¹² However, the idea that society is structured by male domination need not in itself preclude the possibility of change. Since the focal point of radical feminist theory is to make patriarchy visible and to identify which structures of male power need to be challenged, patriarchy does not have to be seen as an unchanging and monolithic structure of oppression. This, I believe, not only recognises that changes in the nature of patriarchy are possible, but also opens up the *possibility* for change in the nature of male domination as women's challenges to it become visible. The recognition of the existence of patriarchy as the source of the most fundamental inequality does not, therefore, exclude the possibility of resistance. Nor does it have to be construed to involve a denial of other

¹¹⁰ See Peter Baker "Maintaining Male Power: Why Heterosexual Men Use Pornography" in C Itzin (ed) *Pornography* 124 at 131.

¹¹¹ The difference, for example, between a society in which sexism is expressed in female infanticide and a society in which sexism takes the form of the marginal representation of women in political institutions can be of quite obvious significance from a feminist perspective: see Jaggar (quoting Barbara Ehrenreich) *Feminist Politics* 83 at 118 n 85 (*supra*). But compare Dworkin who links the pre-revolutionary Chinese practice of foot-binding to the girdles, high heels and eyebrow plucking dictated by American fashion, claiming that for all women "pain is an essential part of the grooming process and that is not accidental ... [it] serves to prepare women for lives of child-bearing, self-abnegation and husband-pleasing": see *Woman Hating* at 115 (*supra*). See also Daly who similarly views foot-binding, witch-burning and genital mutilation as essentially similar manifestations of the universal system of male tyranny in *Beyond God the Father* (*supra*) and *Gyn/Ecology* at 1 (*supra*). For an interesting discussion of women's subordination in Hispanic culture, see Oliva Espin 'Influences on Sexuality in Hispanic/Latin Women' in CS Vance (ed) *Pleasure and Danger* 152 at 157 (*supra*).

⁹⁶ Denise Réaume "The Social Construction of Women and the Possibility of Change: Unmodified Feminism Revisited" 1992 5(1) *Canadian Journal of Women and the Law* 463 at 480.

forms of oppression emerging from cultural, race or class contexts.

2 4 2 The Radical Feminist Structures of Patriarchy

In the context of the larger object of this dissertation, I intend to subject only two structures of patriarchal power identified by radical feminists to closer scrutiny, namely the state and the interrelationship between (female) sexuality and violence.

2 4 2 1 The State as Patriarchal Structure

Unlike most conventional political theory, radical feminism does not view state power as the central political issue that confronts women. The state is viewed as but one manifestation of patriarchal power, thought merely to reflect other deeper structures of oppression. The exclusion of women from its formal institutions is seen as a symptom rather than a cause of gender inequality. Radical feminism therefore links state power both implicitly and inextricably to areas usually seen as private (or non-political) such as the family, personal relationships and sexuality. State power is accordingly seen as basic to all power relations in society; it is part of an ever-present system of patriarchal domination.

This conception of state power does not, however, imply that radical feminism simply rejects the state as a monolithic institution which serves as an instrument of patriarchal oppression. Radical feminism can indeed facilitate a far more sophisticated understanding of the state and state power than, for example, liberal feminism. There are fundamental differences between the liberal feminist and radical feminist conceptions of state. I pointed out above¹¹³ that the former sees the state as an essentially neutral institution which can be utilised as a means of improving the situation of women. So, although liberal feminism sees the exclusion of women from state institutions as unfair, the liberal state can - in principle - be used to advance equal legal and political rights for women. Radical feminism - by contrast - does not view the exclusion of women from power as an unfortunate and easily remediable accident. Since the structures and institutions of the state have been constituted by men and embody their interests (rather than those of women) feminist demands will never be readily conceded to by the state but will inevitably encounter resistance. This supports my earlier conclusion¹¹⁴ that the liberal perspective has no conceptual means of understanding the complex nature of the power relations involved. This could explain why liberal feminism experiences difficulty in recognising both the importance and limitations of conventional politics and legislation designed to ensure formal equality for women. Consequently, the radical feminist conception of (state) power yields a far

¹¹³ See par 2 3 2 1 (*supra*).

¹¹⁴ See par 2 3 2 and par 2 3 2 5 (*supra*).

more sophisticated theory (and realistic assessment) of the state in that it recognises both the power relations at play and the interconnectedness of the different patriarchal structures. I argued above¹¹⁵ that a radical feminist approach can - in principle - recognise the existence of cross-cutting race and class conflicts that will help to determine political outcomes by appreciating that (state) power is not a neutral tool equally available to women and men or different racial groups. This approach duly understands that the nature of power cannot simply be changed by, for example, the appointment of more women in political positions since political outcomes are not structured by individual decisions but by deeply embedded social power relations instead. This insight into the true nature of power helps to explain why South African women experience intolerable levels of violence in an age of unprecedented political representation at both provincial and national level.¹¹⁶ Since the mere appointment of women to senior positions in government does not *per se* translate into a shift in the power imbalance between men and women, radical feminism duly recognises that (state) power is not to be understood on its own terms, but as part of an ubiquitous system of patriarchal power that cuts across racial and class distinctions.

2 4 2 2 Patriarchy, Sexuality and Sexual Violence

The idea that sexuality is not simply an individual matter but one that is bound up with power structures in society is not exclusive to radical feminism.¹¹⁷ Radical feminism views sexuality as the product of a world in which men have authority and male needs and desires set the agenda in all spheres. Sexual behaviour is therefore conditioned by a man-made culture characterised by, *inter alia*, free access to pornography, tolerance of sexual violence, the treatment of women as sex objects and the existence of different moral codes for men and women. Since equality is constituted in society and history,¹¹⁸ sexual behaviour becomes bound up in radical feminist thinking with the idea of ownership, domination and submission.

This conception of sexuality and sexual behaviour raises the question whether radical feminism sees the demand for sexual autonomy as part of the general political struggle against patriarchy

¹¹⁵ See par 2 4 2 (*supra*).

¹¹⁶ See my concluding observations in respect of Chapter 1 of this dissertation par 1 4 and accompanying footnotes (*supra*).

¹¹⁷ Bryson "Radical Feminism: Public and Private Patriarchy" in *Feminist Political Theory* 194 at 211 (*supra*).

¹¹⁸ See Rubin in CS Vance (ed) *Pleasure and Danger* 267 at 276 (*supra*) and "Feminism and Participatory Democracy: Some Reflections on Sexual Difference and Citizenship" in S Kemp and J Squires (eds) *Feminisms* 193 at 196.

(which is both reinforced and reflected by current attitudes and practices)¹¹⁹ or whether it sees sexual autonomy as the main political problem confronting women under a system of patriarchal domination. In an attempt to address this issue, radical feminists have produced three related conceptions of women's sexuality¹²⁰ either to the effect that the denial of sexual freedom under patriarchy translates into forced heterosexuality that is inherently oppressive and unsatisfying to women,¹²¹ or that the patriarchal construct of sexuality is violent in nature (especially as manifested in pornography and rape) or that all forms of domination become eroticised under patriarchy with the result that male power is inextricably entangled with sexuality.¹²²

In light of the scope and objectives of this dissertation,¹²³ the latter two conceptions of sexuality merit closer inspection. Consequently, a discussion of the views of radical feminists on sexuality and violence - with particular reference to pornography - follows next.

¹¹⁹ See Pateman *The Sexual Contract* at 208 (*supra*).

¹²⁰ Dworkin stands central in her support of all three radical feminist conceptions of sexuality as the main political problem confronting women. Her rejection of heterosexuality is not just a matter of personal sexual orientation, but a political act that strikes at the heart of patriarchy. She argues that heterosexuality is imposed upon women for the benefit of men, a means of dividing and controlling women and ensuring that they serve men domestically, emotionally as well as sexually. For her "male domination of the female body is the basic material reality of women's lives; and all struggle for dignity and self-determination is rooted in the struggle for actual control of one's body": see *Pornography: Men Possessing Women* (1981) at 205 (hereinafter referred to as *Pornography*). See also, in general, *Our Blood: Prophecies and Discourses on Sexual Politics* (1982) (London: Women's Press) (hereinafter referred to as *Our Blood*).

¹²¹ See especially Adrienne Rich "Compulsory Heterosexuality and Lesbian Existence" 1980 5(4) *Signs: Journal of Women in Culture and Society* at 647 - 650. Rich's perception of heterosexuality as an economic institution is borrowed from Lisa Leghorn and Katherine Parkers who conceive the enforcement of heterosexuality for women as a means of assuring male right of physical, economical and emotional access in "Towards a Feminist Economics: A Global View" 1979 5(3) *Second Wave* at 23 - 30. For a comprehensive critique of this radical conception of women's sexuality, see Lynne Segal *Is the Future Male? Troubled Thoughts on Contemporary Feminism* (1987) at 97; 77 - 78 and "Sexual Liberation and Feminist Politics" in *Straight Sex: The Politics of Pleasure* (1994) at 309 - 318.

¹²² MacKinnon is the leading exponent of the latter two radical feminist conceptions of sexuality: see, in general, *Feminism Unmodified* (*supra*); "Sexuality, Pornography and Method: Pleasure under Patriarchy" 1989 99(2) *Ethics* (*supra*); and "Sexuality"; "Rape: On Coercion and Consent"; and "Pornography: On Morality and Politics" in *Feminist Theory* (*supra*).

¹²³ See Chapter 1 of this dissertation par 1 2 and accompanying footnotes (*supra*).

2 4 2 3 Sexuality, Patriarchal Violence and Pornography

For radical feminism, the issue of (sexual) violence is premised upon the central idea that patriarchy - like all other systems of power - ultimately rests on force. Kate Millett was instrumental in doing the groundwork for what was to become the radical feminist conception of the nature of patriarchal control by arguing that control in patriarchal society would be imperfect (even inoperable) unless it had the rule of force to rely upon as an ever-present instrument of intimidation.¹²⁴

The idea that patriarchal violence may be institutionalised in the law, but also finds direct expression in and frequently takes the form of sexual violence, particularly rape, has led radical feminists to argue that sexual abuse and rape are part of a whole culture in which the threat of sexual violence dominates women's lives.¹²⁵ Radical feminism therefore conceptualises sexual aggression against women as an expression of male power rather than of ungovernable male lust. The fear which it engenders in women is thought to be central to their control by and subordination to men. Violence against women is thus seen by radical feminists as an effective form of social control, a political act from which all men derive some social benefit.¹²⁶ The fact that all men do not beat or rape their partners is not, for example, deemed proof that instances of violence against women are irregular, unsystematic practices. It is merely thought to confirm that it is not necessary to commit acts of violence against women in order to maintain (and therefore still benefit from) the privileges of the dominant group.¹²⁷ The radical feminist account of the interrelationship between sexuality and pornography evolved directly from the basic premise that female sexuality is shaped under conditions of gender inequality in patriarchal society. As pointed out above,¹²⁸ gender inequality is seen to result from male domination. This has led radical feminists to argue that the characteristics of female sexuality are mere imposed

¹²⁴ See *Sexual Politics* at 43 (*supra*). See also MacKinnon "The Liberal State" in *Feminist Theory* 157 at 160 (*supra*).

¹²⁵ See, in particular, MacKinnon 1989 99(2) *Ethics* at 332 (*supra*).

¹²⁶ Susan Brownmiller argues that because sexual violence restricts women's freedom of movement and has a negative impact on their lives, it leads women to seek the protection of one man against the threat posed by others: see *Against Our Will* (1977) at 15. The same argument is advanced by Laura Lederer (ed) *Take Back the Night: Women on Pornography* (1982) (New York: William Morrow and Co Inc) and Vance "Pleasure and Danger: Toward a Politics of Sexuality" in CS Vance (ed) *Pleasure and Danger* 1 at 3 (*supra*).

¹²⁷ See Jalna Hanmer "Violence and the Social Control of Women" in G Littlejohn et al *Power and the State* (1978) at 229.

¹²⁸ See par 2 4 (*supra*).

responses to male dominance and its needs and desires.¹²⁹ Female sexuality is therefore thought to possess no intrinsic content or value because it is constructed out of social conditions of oppression and inequality.¹³⁰ For radical feminism, female sexuality is thus a social construct of male power.

Catharine MacKinnon's understanding of the interrelationship between women's sexuality and pornography is aided by one of Andrea Dworkin's early works¹³¹ where the latter conceptualises sexuality as a construct of gender inequality which is given meaning by, through and in pornography.¹³² MacKinnon thus conceptualises pornography as a means through which female sexuality is socially constructed in patriarchal society.¹³³ The basic premise of her argument against pornography is that since female sexuality is forged through the process of objectification,¹³⁴ pornography constructs women as accessible objects or things for sexual use.¹³⁵ Through the process of sexual objectification (made possible through pornography) a social meaning is thus imposed on women as a class.

Radical feminism does not, therefore, conceive of pornography as harmless fantasy or mere sexually explicit images or portrayals.¹³⁶ They view pornography as a vehicle through which gender inequality becomes sexual instead¹³⁷ and this explains why radical feminists regard pornography as a central practice in the sexually based subordination of women.¹³⁸

The argument that women appear in pornography by their own free will is therefore directly

¹²⁹ See Dworkin in C Itzin (ed) *Pornography* 515 at 525 - 531 (*supra*).

¹³⁰ See MacKinnon "Sexuality" in *Feminist Theory* 126 at 151 - 153 (*supra*).

¹³¹ See Dworkin "The Root Cause" in *Our Blood* (*supra*).

¹³² At 96 - 111 (*supra*). For a comprehensive discussion of Dworkin and MacKinnon's conception of pornography, see Chapter 3 of this dissertation par 3 5, especially par 3 5 1 and accompanying footnotes (*infra*).

¹³³ See MacKinnon *Feminist Theory* 126 at 139 (*supra*).

¹³⁴ At 127 (*supra*).

¹³⁵ At 140 (*supra*).

¹³⁶ This represents the most fundamental difference in the radical and liberal feminist conceptions of pornography: see par 2 3 3 and accompanying footnotes (*supra*).

¹³⁷ See *Feminist Theory* 126 at 139 - 140 (*supra*). See also "Not a Moral Issue" 1984 2 *Yale Law & Policy Review* 321 at 326.

¹³⁸ See, in particular, Dworkin in C Itzin (ed) *Pornography* 515 at 527 (*supra*).

challenged by radical feminism. The idea that women are free autonomous moral agents is called into question by the actual material conditions of women's oppression. The high incidence of rape, sexual violence and brutality against women suggests that women are not in a position to negotiate the terms of sexual interaction. Therefore, until women are socially and politically equal to men, radical feminism claims that it will be impossible to know whether women participate freely in pornography. The liberal feminist argument to the effect that any curtailment of so-called "sexual expression" or "sexually explicit speech"¹³⁹ would be detrimental to women, because such a restriction would infringe upon women's free capacity to participate in the creation of pornography, is thus far from convincing. Not only is such an argument far removed from the actual socio-political conditions of women, but this assertion also fails to explain why so many of the products of pornography have the same appearance and contain the same hackneyed version of the sexual characteristics which adult heterosexual pornography typically attributes to women.

This particular view of freedom and (female) sexuality means that radical feminist arguments against pornography are not on the whole directed against sexual explicitness as such. Instead, these arguments are directed against the association of sexual explicitness with violence and domination and the depiction of women as passive, sexually available objects.¹⁴⁰ The radical feminist conception of sexuality could therefore facilitate two main arguments against pornography. At the most basic level, it could be argued that the existence and availability of violent pornography desensitise the viewer or reader to acts of violence against women¹⁴¹ and that the lie propagated in pornography that women enjoy pain, humiliation and/or domination leads women to internalise a false view of their sexuality.¹⁴² On a more advanced level, a radical feminist framework could sustain the argument that pornography is both a system and cause of

¹³⁹ See, in particular, par 2 3 3 n 85 (*supra*) for a discussion of the arguments raised by Hunter and Law in P Smith (ed) *Feminist Jurisprudence* at 467 - 481 (*supra*). See also, in general, Alison Assiter and Avedon Carol (eds) *Bad Girls and Dirty Pictures: The Challenge to Reclaim Feminism* (1993) (London: Pluto Press) and Mary Dunlap "Sexual Speech and the State: Putting Pornography in Its Place" 1987 17 *Golden Gate University Law Review* 359.

¹⁴⁰ See Susanne Kappeler "Pornography: The Representation of Power" in C Itzin (ed) *Pornography* 88 - 101 (*supra*).

¹⁴¹ Emily Jackson also suggests that pornography has an impact beyond that on its direct consumers and victims: see "The Problem with Pornography: A Critical Survey of the Current Debate" 1995 3(1) *Feminist Legal Studies* 49 at 61.

¹⁴² See Susan Griffin *Pornography and Silence: Culture's Revenge Against Nature* (1981) (London: Women's Press); Dworkin *Pornography* (1981) (London: Women's Press) (*supra*); and *Letters from a War Zone* (1988) (London: Secker and Warburg).

male power over and abuse of women.¹⁴³ The latter argument conceptualises violence against women in pornography as an expression of gender hierarchy¹⁴⁴ and sees pornography at the heart of the female condition of oppression.¹⁴⁵

It becomes important in this context to determine whether radical feminism conceives rape as an expression of violence against women or rather of sexual desire. MacKinnon argues forcefully that it is impossible to disentangle violence and desire in patriarchal society because gender identity and sexuality is learned in a context of (male) domination and (female) submission from which it becomes inseparable.¹⁴⁶ Sexual pleasure for women is therefore masochistic while for men it is eroticised, thus becoming men's prime motive for oppressing women.¹⁴⁷ Seen in this radical context, pornography does not simply create oppressive sexual needs, but it reflects them. Pornography thus gives men what they already want, namely "women bound, women battered, women tortured, women humiliated, women degraded and defiled, women killed" or women sexually accessible "wanting to be taken and used, with perhaps just a little light bondage."¹⁴⁸ Since pornography sets the public standard for the treatment of women in private, it sexualises the definition of male as dominant and female as subordinate.¹⁴⁹ Radical feminism therefore suggests that in an environment of social equality - free from the influence of pornography - sex might be experienced and presented differently - not in terms of male definition or of male dominance or power, but based on reciprocity, mutuality and equality.¹⁵⁰

¹⁴³ See Catherine Itzin 'Pornography and the Social Construction of Sexual Inequality' in C Itzin (ed) *Pornography* 57 at 65 - 68 (*supra*).

¹⁴⁴ See MacKinnon *Feminist Theory* 126 at 143 (*supra*).

¹⁴⁵ See Dworkin *Right-Wing Women: The Politics of Domesticated Females* (1983) at 223. See also Chapter 6 of this dissertation par 6 5, especially par 6 4 3 and accompanying footnotes (*infra*).

¹⁴⁶ See MacKinnon 1989 99(2) *Ethics* at 335 (*supra*); *Feminist Theory* 126 at 144 - 154 (*supra*); and "Defamation and Discrimination"; "Racial and Sexual Harassment"; and "Equality and Speech" in *Only Words* (1993) 3 at 10, 20 - 27, 29; 43 at 58 - 60, 68; and 69 at 88, 90, 92, 100 - 102 respectively. See also Chapter 6 of this dissertation par 6 5, especially par 6 5 4 and accompanying footnotes (*infra*).

¹⁴⁷ See 1989 99(2) *Ethics* at 335 (*supra*).

¹⁴⁸ At 326 - 327 (*supra*). See also Gloria Steinem 'Erotica and Pornography: A Clear and Present Difference' in L Lederer (ed) *Take Back the Night* at 37 - 38 (*supra*).

¹⁴⁹ MacKinnon "Toward a Feminist Jurisprudence" in P Smith (ed) *Feminist Jurisprudence* 610 at 616 (*supra*).

¹⁵⁰ See Itzin "Introduction: Fact, Fiction and Faction" in C Itzin (ed) *Pornography* 1 at 19 (*supra*).

2 4 3 An Assessment of the Suitability of Radical Feminism as Theoretical Framework in Formulating a Constitutional Response to Adult Heterosexual Pornography

Radical feminism - to my mind - provides a valuable conception of pornography and sexuality by showing how sexuality - and more specifically female identity - is constructed through a gender hierarchy in which women are subordinated and subjected. By recognising the constitutive role of sexuality in the creation and perpetuation of male dominance, radical feminism provides the conceptual foundation to bring sexuality into the domain of politics. This conception makes it possible to consider the social and political significance of the differences between the sexes and opens up the possibility of formulating a theory of equality that envisages the end of the domination of women by confronting the relationship between sex and sexuality as these have been constituted by the gender identity imposed upon women by patriarchy. Radical feminism thus enlarges the domain of politics to make visible previously concealed forms of oppression. Only once the constitutive role of sexuality in the creation and perpetuation of male domination is understood, can rape, battering, sexual abuse and pornography be seen as, *inter alia*, barriers to the achievement of substantive equality for women. This theoretical stance duly recognises that the law has the ideological capacity to reinforce the devaluation of women and that the law should, therefore, carry the burden of mediating substantive change. I therefore submit that only a framework which conceptualises pornography as a constitutional (i.e. *legal*) problem that affects the fundamental rights and freedoms of women, can transcend the problems inherent in a moralistic understanding of pornography¹⁵¹ and has the potential to facilitate meaningful doctrinal change.

This does not, however, imply that I find the whole of the radical feminist account of women's oppression valuable. In addition to the difficulties which I have raised in respect of the radical feminist theory of patriarchy,¹⁵² I also find MacKinnon and Dworkin's conception of (heterosexual) sex problematic. Although I do not wish to challenge their argument that sexuality is a social construct, one will, however, be hard pressed to explain how such a pervasive oppression of women can be challenged or how domination and masochism can be ended if they have become rooted in the psyche of every man and woman. I do not think, though, that it is necessary to accept MacKinnon's extreme contention that *all* heterosexual sex is male

¹⁵¹ For a comprehensive discussion of the problems inherent in a moralistic understanding of adult heterosexual pornography, see Chapter 3 of this dissertation (*infra*).

¹⁵² See par 2 4 1 (*supra*).

power eroticised which translates into rape¹⁵³ (or Dworkin's view of sex as a manifestation of male hatred and contempt for women) in order to argue that sexuality, violence and pornography are important (inter-linked) aspects of patriarchal power which bear on women's rights to equality, dignity and physical integrity. The strength of such a less extreme argument is two-fold. First, it enables one to distinguish between the structures and agents of women's oppression, thereby not simply discarding the possibility of male support for campaigns directed at ending women's subordination or changes in male behaviour. It goes without saying that it is essential to create a climate for male co-operation and support if the gender organization of society is ever to be reshaped. Furthermore, by challenging and dismantling the structures of male power and privilege will it become possible to distinguish between the structures and agents of women's oppression.¹⁵⁴ This - in turn - may enable us to observe changes in the nature of patriarchy itself which may otherwise be obscured. Secondly, even if Dworkin and MacKinnon's extreme argument about heterosexual sex is not employed, it will nevertheless still be possible to conceptualise sexuality and violence against women as means of patriarchal power which can be challenged within the ambit of a supreme constitution with a justiciable bill of rights.

So although I agree that one must guard against a crude reductionism that ignores the interaction of (women's) sexuality with other patriarchal structures of domination, a radical feminist framework seems best suited to comprehensively address pornography as a human rights issue. I have shown above¹⁵⁵ that although radical feminism can be subjected to justifiable criticism, particularly in relation to its understanding of the nature of women's oppression, the problems that could be raised with regard to certain aspects of radical feminist thought are not insurmountable. The radical feminist view that there exists a common women's experience could in fact be particularly useful in understanding the issue of harm related to pornography. And since the manner in which harm is to be construed is - in turn - inextricably linked to the task of formulating a legal definition of pornography,¹⁵⁶ radical feminist claims that pornography objectifies women as a class could directly assist in the formulation of such a legal definition. A radical feminist framework could furthermore support an argument for the regulation (or prohibition) of pornography. Radical feminism could thus sustain the formulation of a legal

¹⁵³ See MacKinnon in E Abel and E Abel (eds) *The Signs Reader* (*supra*); 1989 99(2) *Ethics* (*supra*); and 1991 100 *Yale Law Journal* (*supra*).

¹⁵⁴ See Michael Kaufman "Men, Feminism, and Men's Contradictory Experiences of Power" in H Brod and M Kaufman (eds) *Theorizing Masculinities* (1994) (California: Sage Publications). See also Peter Baker "Maintaining Male Power: Why Heterosexual Men Use Pornography" in C Itzin (ed) *Pornography* 124 at 129 (*supra*).

¹⁵⁵ See par 2 4 1 and accompanying footnotes (*supra*).

¹⁵⁶ See Chapter 5 of this dissertation par 5 5 and accompanying footnotes (*infra*).

response to a phenomenon conceptualised in relation to gender-specific objectification, degradation and subordination. And since it is the primary objective of the present study to explore whether pornography implicates the constitutional rights and freedoms of women as a class¹⁵⁷ and whether pornography could thus reasonably and justifiably be regulated by law,¹⁵⁸ radical feminism's (essentialist)¹⁵⁹ understanding of women's situation would appear to be ideally suited to the realisation of these particular objectives.

Accordingly, the *primary constitutional argument* against adult heterosexual pornography that I intend to explore further in Chapter 6 of this dissertation can be formulated as follows:

Adult heterosexual pornography is a patriarchal practice which violates the right to equality, the right to human dignity and the right to freedom and security of the person that are respectively entrenched in sections 9, 10 and 12 of the Bill of Rights in the South African Constitution.

This constitutional argument seeks to, *inter alia*, establish whether adult heterosexual pornography differentiates between men and women (thus possibly constituting unfair discrimination on the basis of sex)¹⁶⁰ and/or whether it confirms gender stereotypes and prejudice (thus affecting women's social status).¹⁶¹ The role of adult heterosexual pornography in creating a culture of rape, sustaining misogyny and placing women in postures of sexual submission and/or servility will also be subjected to close constitutional scrutiny.¹⁶²

¹⁵⁷ On the significance of this, see Chapter 6 of this dissertation (*infra*).

¹⁵⁸ See Chapter 7 of this dissertation par 7 3 and accompanying footnotes (*infra*).

¹⁵⁹ By virtue of their anti-essentialist stance on the nature of women's oppression, postmodern feminists appear hesitant to frame a response to pornography within the ambit of the law. See, in particular, Smart "Feminism and the Law: Some Problems of Analysis and Strategy" (1986) 14 *International Journal of the Sociology of Law*; "Theory into Practice: The Problem with Pornography" in 1989 *Feminism and the Power of Law* 114 at 136 and Réaume 1992 5(1) *Canadian Journal of Women and the Law* 463 (*supra*).

¹⁶⁰ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 2 and accompanying footnotes (*infra*).

¹⁶¹ See Chapter 6 of this dissertation par 6 4, especially par 6 4 3 and accompanying footnotes (*infra*).

¹⁶² See Chapter 6 of this dissertation par 6 5, especially par 6 5 1 - par 6 5 4 and accompanying footnotes (*infra*).

2 5 CONCLUDING OBSERVATIONS

I have argued in this chapter that the appropriate framework for an investigation into the constitutionality of adult heterosexual pornography must be capable of exposing a patriarchal conceptualization of women's subordinate status in contemporary society, understand sexuality and gender as social constructs, be sensitive to systemic violence against women and explore the possibility of pornography as a process through which female sexuality is constituted and gender inequality entrenched.

I have found that the liberal feminist conception of women's subordination is not ideally suited to address adult heterosexual pornography as a constitutional issue, particularly in relation to women's interests in equality, human dignity and physical integrity. This is largely due to liberal feminism's often uncritical acceptance of traditional liberal principles¹⁶³ and an understanding of pornography as a matter of free expression premised upon choice.¹⁶⁴ Consequently, a liberal feminist conception of pornography can at best support a limited (constitutional) argument against pornography, an argument which is largely made possible by a unique feature of the South African Constitution.¹⁶⁵

By contrast, radical feminism is better suited to provide a comprehensive constitutional critique of adult heterosexual pornography, because this particular conception of women's situation accentuates the power relations at play, the significance of representation and the very real (and at times extreme) social consequences of pornography as an ubiquitous patriarchal practice.¹⁶⁶

By viewing sexuality (and gender) as social constructs, radical feminism duly recognises that pornography (as a public and inescapable practice) implicates women's sexual identity. This understanding of the role of pornography in a male dominated society necessitates an assessment of our (socio-political) context. And since radical feminism understands pornography as both a constituent feature of - as well as a dynamic actor in - our social design, the acute power

¹⁶³ See par 2 3 2, especially par 2 3 2 1 - par 2 3 2 5 and accompanying footnotes (*supra*).

¹⁶⁴ See par 2 3 3 and accompanying footnotes (*supra*). See also Chapter 3 of this dissertation par 3 4, especially par 3 4 1 - par 3 4 3 and accompanying footnotes (*infra*).

¹⁶⁵ Notably section 16(2)(c) of Act 108 of 1996 (*supra*) which expressly prohibits the "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

¹⁶⁶ See par 2 4 2 2 - par 2 4 2 3 and accompanying footnotes (*supra*). See also Chapter 6 of this dissertation par 6 5, especially par 6 5 3 and accompanying footnotes (*infra*).

imbalance that stands central to pornography is revealed. In a patriarchal society, pornography is thus sustained by unequal power relations - as are indeed all (other) patriarchal practices which implicate women's sexuality.¹⁶⁷ Radical feminism therefore conceptualises pornography - together with sexual harassment, assault, rape and prostitution - as issues of gender/sex inequality.¹⁶⁸

These insights are particularly useful in a South African (constitutional) context. Since the South African Constitution expressly entrenches the right to equality,¹⁶⁹ the right to human dignity¹⁷⁰ as well as the right to freedom and security of the person,¹⁷¹ pornography - conceptualised as a pervasive patriarchal practice of oppression - can be evaluated with particular reference to these three fundamental rights. And because a radical feminist framework accentuates the actual socio-political conditions of women, a radical feminist conception of pornography appears to be ideally suited to facilitate both a comprehensive and a critical evaluation of adult heterosexual pornography within the ambit of the South African legal and constitutional order.¹⁷²

In the next chapter, the potential of the (moralistic inspired) obscenity jurisprudence of the United States Supreme Court to suitably address both liberal¹⁷³ and radical feminist concerns¹⁷⁴ about pornography will be critically examined. Chapter 3 - the first in a trilogy which seeks to evaluate the various approaches followed in the United States, Canada and South Africa in respect of sexually explicit material - is directly intended to assist in the formulation of a (legal) definition and a suitable conception of the harm of adult heterosexual pornography for South African (constitutional) law.

¹⁶⁷ On the significance of this, see par 2 4 1 and accompanying footnotes (*supra*). See also Chapter 5 of this dissertation par 5 5 and accompanying footnotes (*infra*).

¹⁶⁸ See par 2 4 2 2 - par 2 4 2 3 and accompanying footnotes (*supra*). On the significance of this, see Chapter 6 of this dissertation par 6 4 3 2, especially par 6 4 3 2 1 - par 6 4 3 2 2 and accompanying footnotes (*infra*).

¹⁶⁹ See section 9 of Act 108 of 1996 (*supra*).

¹⁷⁰ See section 10 of Act 108 of 1996 (*supra*).

¹⁷¹ See section 12 of Act 108 of 1996 (*supra*).

¹⁷² See par 2 4 3 and accompanying footnotes (*supra*).

¹⁷³ See par 2 3 3 and accompanying footnotes (*supra*).

¹⁷⁴ See par 2 4 3 and accompanying footnotes (*supra*).

CHAPTER 3

HARMLESS EXPRESSION OR A VIOLATION OF CIVIL RIGHTS? A CRITICAL EVALUATION OF THE DIFFERENT CONCEPTIONS OF PORNOGRAPHY IN UNITED STATES CONSTITUTIONAL JURISPRUDENCE

| | PAGE |
|---|------|
| 3 1 INTRODUCTION | 73 |
| 3 2 PORNOGRAPHY UNDER COMMON LAW | 75 |
| 3 2 1 The Facts in <i>Regina v Hicklin</i> | 76 |
| 3 2 2 The Opinion of the Court of Queen's Bench | 77 |
| 3 3 OBSCENITY AND THE FIRST AMENDMENT: UNITED STATES SUPREME COURT JURISPRUDENCE | 80 |
| 3 3 1 The Facts in <i>Roth v United States</i> | 80 |
| 3 3 2 The Decision of the Supreme Court | 81 |
| 3 3 3 The Supreme Court's Definition of Obscenity | 83 |
| 3 3 4 A Period of Legal Uncertainty: United States Supreme Court Obscenity Jurisprudence between 1957 and 1973 | 85 |
| 3 3 5 The Facts in <i>Miller v California</i> | 88 |
| 3 3 6 The Opinion of the Supreme Court | 88 |
| 3 4 A CRITICAL ASSESSMENT OF THE CONCEPTION OF PORNOGRAPHY EMPLOYED BY THE UNITED STATES SUPREME COURT | 91 |
| 3 4 1 Employing a Liberal Paradigm: The Modern Doctrine of Free Speech | 95 |
| 3 4 2 The Supreme Court's Philosophical Justification for the Constitutional Protection of Freedom of Expression | 96 |
| 3 4 3 The Possible Constitutional Consequences of an Instrumental Justification of Freedom of Expression in relation to Pornography | 100 |
| 3 4 4 The Supreme Court's Conception of Harm and the Standard of Obscenity in <i>Miller v California</i> | 103 |

| | | |
|-----------|---|-----|
| 3 4 4 1 | “(a) whether the <i>average person</i> , applying <i>contemporary community standards</i> would find that the work, taken as a whole, appeals to the <i>prurient interest</i> ” | 105 |
| 3 4 4 2 | “(b) whether the work depicts or describes, in a <i>patently offensive</i> way, sexual conduct <i>specifically defined by the applicable state law</i> ” | 108 |
| 3 4 4 3 | “(c) whether the work, taken as a whole, lacks <i>serious</i> literary, artistic, political, or scientific value” | 109 |
| 3 4 5 | To Summarise | 111 |
| 3 5 | RADICAL FEMINIST INITIATIVES IN RESPONSE TO THE CONCEPT OF PORNOGRAPHY EMPLOYED BY THE UNITED STATES SUPREME COURT | 113 |
| 3 5 1 | A Tale of Two Cities: The Anti-Pornography Ordinances for Minneapolis and Indianapolis | 114 |
| 3 5 1 1 | The City of Minneapolis: From Zoning Restrictions to a Civil Rights Violation | 114 |
| 3 5 1 2 | The Dynamics of the Civil Rights Ordinance for Minneapolis | 116 |
| 3 5 1 2 1 | Pornography as Subordination | 117 |
| 3 5 1 2 2 | Pornography as a Form of Sex Discrimination | 118 |
| 3 5 1 2 3 | Pornography as a Cause of Sex Discrimination | 119 |
| 3 5 1 3 | The Passage and Fate of the Anti-Pornography Ordinance for Minneapolis | 120 |
| 3 5 1 4 | The Anti-Pornography Ordinance for Indianapolis: <i>American Booksellers Association Inc v William Hudnut</i> | 122 |
| 3 6 | RESPONDING TO THE RADICAL FEMINIST CONCEPTION OF PORNOGRAPHY: THE PROPOSALS OF SUNSTEIN AND DOWNS | 128 |
| 3 6 1 | Finding a Golden Mean Between Prurience and the Constitutional Interests of Women: The Problem of Violent Pornography | 129 |
| 3 6 2 | A Critical Assessment of Sunstein and Downs’ Proposals for Legal Reform | 131 |
| 3 7 | CONCLUDING OBSERVATIONS | 133 |

CHAPTER 3

HARMLESS EXPRESSION OR A VIOLATION OF CIVIL RIGHTS? A CRITICAL EVALUATION OF THE DIFFERENT CONCEPTIONS OF PORNOGRAPHY IN UNITED STATES CONSTITUTIONAL JURISPRUDENCE

"I shall not today attempt to define the kinds of material I understand to be [hard core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it.*"¹

"Mr Justice Potter Stewart might have known obscenity when he saw it, but with respect, I do not, nor would in any way claim to any intuitive and immediate recognition of what is indecent."²

"Obscenity law is concerned with morality, meaning good and evil, virtue and vice. The concerns of feminism with power and powerlessness are first political, not moral. From the feminist perspective, obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. Obscenity conveys moral condemnation as a predicate to legal condemnation. Pornography identifies a political practice that is predicated on power and powerlessness - a practice that is, in fact, legally protected. *The two concepts represent two entirely different things.*"³

3 1 INTRODUCTION

The quest for a (legal) definition of adult heterosexual pornography - by its very nature - brings into sharp relief the various challenges presented by an investigation into the possible implications of pornography on women's fundamental rights and freedoms. The previous chapter sought to meet the challenge of establishing suitable theoretical frameworks within which this constitutional endeavour could unfold. This chapter is the first in a trilogy which seeks to evaluate the different conceptualisations of pornography in Anglo-American jurisprudence,⁴ an enterprise which is intended to culminate in the formulation of a legal definition of adult heterosexual pornography that could support arguments against pornography within the ambit

¹ Stewart J in *Jacobellis v The State of Ohio* 378 US 184 (1964) at 197. My emphasis.

² Sachs J in *Case; Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (CC) at 652.

³ Catharine MacKinnon "Pornography: On Morality and Politics" in *Toward a Feminist Theory of the State* (1989) 195 at 196 (hereinafter referred to as *Feminist Theory*). My emphasis.

⁴ To this end, the constitutional jurisprudence of the United States of America, Canada and South Africa will be critically assessed in three consecutive chapters.

of the Bill of Rights of the South African Constitution.⁵

Although various attempts to produce a legal definition of pornography have been criticised as either too vague or too broad (or even under broad),⁶ some attempt at defining pornography remains an essential preliminary to any meaningful discussion thereof. I indicated in Chapter 2 that the theoretical mould(s) within which a definition is cast will determine the extent of an effective constitutional challenge to pornography, and - in turn - set guidelines for its possible regulation or prohibition.⁷ It was suggested in Chapter 1 that the constitutional parameters within which these debates should arguably be situated are determined by various factors. These, *inter alia*, include the political and constitutional history of a country, its current constitutional dispensation, its fundamental constitutional values and the founding principles of its democratic order.⁸ In the event of a constitutional democracy (which is characterised by the presence of a supreme constitution with a justiciable bill of rights)⁹ a legal definition of pornography formulated with the objective to frame it as an infringement of women's fundamental rights and freedoms must be mindful of these parameters. Certain constitutional rights and/or values might have to be prioritised and this process may be guided and/or influenced by various factors, each of which will require careful consideration.

I pointed out in the preceding chapter that two constitutional arguments - each emanating from a distinctly feminist paradigm¹⁰ - will be explored in this dissertation. Therefore, the primary

⁵ Act 108 of 1996.

⁶ For a comprehensive discussion of the success of various attempts at formulating a legal definition of pornography in Anglo-American jurisprudence, see James Lindgren "Defining Pornography" 1993 141(4) *University of Pennsylvania Law Review* 1156.

⁷ See Chapter 2 par 2 3 3 and par 2 4 3 of this dissertation and accompanying footnotes (*supra*).

⁸ For a discussion of these hermeneutical "parameters", see Chapter 1 of this dissertation par 1 3 and accompanying footnotes (*supra*).

⁹ On the meaning and implication of this, see Chapter 1 par 1 1 of this dissertation n 10 and n 11 (*supra*).

¹⁰ These two constitutional arguments against adult heterosexual pornography respectively emanate from radical and liberal feminist thinking. The *primary* constitutional argument against pornography can be formulated as follows: "*adult heterosexual pornography is a patriarchal practice which violates the right to equality, the right to human dignity, the right to freedom and security of the person and the right to freedom from servitude that are respectively entrenched under sections 9, 10, 12 and 13 of the Bill of Rights of the South African Constitution.*" The *alternative* constitutional argument against pornography can be formulated to read: "*a particular category of adult heterosexual pornographic material constitutes the advocacy of hatred that is*

objective of the present chapter is to assess whether United States constitutional law can accommodate these feminist frameworks in a critique of pornography. To this end, this chapter is divided into three parts. The first part will entail a brief exposition of pornography under common law¹¹ as a prelude to a discussion and critical assessment of the obscenity jurisprudence of the Supreme Court of the United States of America.¹² Part two will examine the circumstances leading to, the content of, as well as the Supreme Court's reaction to the legal definition of pornography formulated by Andrea Dworkin and Catharine MacKinnon in direct response to the court's treatment of obscenity.¹³ Finally, the proposals of Cass Sunstein and Donald Alexander Downs in reply to the radical feminist conception of pornography will be examined critically.¹⁴

3 2 PORNOGRAPHY UNDER COMMON LAW

One of the oldest definitions of pornography under common law is found in the Obscene Publications Act which dates from 1857.¹⁵ Its chief architect, Lord Campbell, articulated the purpose of the Act during a session of the British Parliament as follows:

“[t]he measure was intended to apply exclusively to works written for the single purpose of corrupting the morals of youth and of a nature calculated to stock common feelings of decency in a well-regulated mind.”¹⁶

This formulation (which became known as Lord Campbell's test) was revisited in 1868 when Cockburn CJ was called upon to give meaning to the concept of obscenity in a decision of the Queen's Bench in *The Queen on the Prosecution of Henry Scott, Applicant v Benjamin Hicklin and Another, Justices of Wolverhampton, Respondents* (popularly referred to as *Regina v*

based on gender and that constitutes incitement to cause harm which can reasonably and justifiably be prohibited under section 16(2)(c) and section 36 of the Bill of Rights of the South African Constitution.” See also, in general, Chapter 2 par 2 3 3 and par 2 4 3 of this dissertation and accompanying footnotes (supra).

¹¹ See par 3 2 (*infra*).

¹² See par 3 3 and 3 4 (*infra*).

¹³ See par 3 5 (*infra*).

¹⁴ See par 3 6 (*infra*).

¹⁵ 20 & 21 Vict c83 of 1857. See also par 3 2 1 and accompanying footnotes (*infra*).

¹⁶ *Hansard* (Fifth Series) House of Commons 1857 Vol 494 Column 170.

Hicklin).¹⁷ The standard established by the Queen's Bench is a telling example of the strong moralistic overtones of Victorian legal thinking which - despite the constitutional mould in which the debate has since been cast - still resonates acutely in United States obscenity law.¹⁸ My summary of *Regina v Hicklin* - which follows directly below - is merely intended to place the debate in its historical (or common law) context and to serve as basic introduction to the issue as it unfolded in the United States,¹⁹ Canada²⁰ and South Africa.²¹ It will become evident from my summary of the *Hicklin* case that the Queen's Bench based its decision on two key assumptions: first, that a positive obligation rests on the state to protect those citizens who are particularly *susceptible* to immoral influences and, secondly, that in order to determine whether sexually explicit material is obscene, a court must establish its effect on corruptible minds that are open to such influences and are likely to come into contact with such material.²² Consequently, any *bona fide* intention on the part of a distributor and/or publisher of obscene material was irrelevant to a finding of obscenity under English common law.

3 2 1 The Facts in *Regina v Hicklin*

The Crown police had entered the house of one Henry Scott in Wolverhampton (who was a member of a group called "The Protestant Electoral Union") and seized by special warrant 252 copies of a pamphlet entitled *The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession*. The pamphlet - of which between two and three thousand copies had been sold - consisted of extracts taken from the writings of theologians in the original Latin together with a free English translation as well as condemning notes on the doctrine and discipline of the Roman Catholic Church. Half of the pamphlet's contents related to "impure and filthy acts, words, and ideas" in that it purported to reveal the techniques used by priests to extract "immoral confessions" from female penitents.²³

Scott appealed against the special warrant that had been issued by two magistrates under the

¹⁷ (1868) LR 3 QB 360.

¹⁸ See in, particular, par 3 3 and par 3 4 (*infra*).

¹⁹ See par 3 3 and accompanying footnotes (*infra*).

²⁰ See Chapter 4 of this dissertation (*infra*).

²¹ See Chapter 5 of this dissertation (*infra*).

²² See par 3 2 2 (*infra*).

²³ At 363 (*supra*).

Obscene Publications Act²⁴ which led to the seizure of the pamphlets in question. Under section 1 of the Act, a complaint could be brought before two justices if there was reason to believe that any obscene material was kept on any premises for the purpose of sale or distribution. The section also required the complainant to state under oath that articles of the like had been sold, distributed, exhibited, lent or otherwise published from the premises in question. Upon issue of the special warrant the magistrates had to be satisfied that the belief of the complainant was well founded and that the material in question was of such character and description that the publication of it would constitute a misdemeanour under English law.²⁵ Scott's appeal first served before the Court of Quarter Sessions where the Recorder of London (one Benjamin Hicklin) found upon the facts that the sale and distribution of the pamphlets did not constitute a misdemeanour and that their possession by the appellant was not, therefore, unlawful within the meaning of the Obscene Publications Act. The Recorder consequently overruled the order of the two magistrates and directed that the seized pamphlets be returned to the appellant. The Queen's prosecutor subsequently appealed to the Court of the Queen's Bench where the matter was heard by Cockburn CJ, Blackburn J, Mellor J and Lush J.

3 2 2 The Opinion of the Court of Queen's Bench

Cockburn CJ found that the publication of the obscene material in question indeed constituted an offence under English statutory law and thus reversed the judgment of the Recorder and affirmed the decision of the magistrates.²⁶ In reviewing the judgment of the Recorder, the Chief Justice found that the Recorder had reversed the magistrates' decision upon the ground that, although the pamphlet was an obscene publication, the immediate intention of the appellant was not to affect the public mind but to expose practices and perceived errors of the confessional system of the Roman Catholic Church instead. Cockburn CJ, however, felt that if there is an infraction of law, the intention to break the law must be inferred²⁷ and consequently, the criminal

²⁴ 20 & 21 Vict c83 of 1857 section 1.

²⁵ During the nineteenth century, the provisions of section 1 of the Obscene Publications Act were incorporated into the Obscene Publications Act of the old Cape Colony. Although various statutes were adopted in the provinces of Natal, the Orange Free State and Transvaal in 1898, 1902 and 1909 respectively, Act 31 of 1892 (Cape) constituted the basis of legislation designed to establish a uniform system of censorship in all four provinces prior to the establishment of the Union of South Africa in 1910 by virtue of the South Africa Act of 1909 (9 Edv VII c9). For a detailed discussion of the legislative history of censorship in South Africa, see Chapter 5 of this dissertation (*infra*).

²⁶ At 372 - 373 (*supra*). Blackburn J, Mellor J and Lush J concurring at 373 - 379 (*supra*).

²⁷ At 370 (*supra*).

character of a publication was not affected or qualified by the presence of some ulterior *bona fide* intention on the part of the perpetrator. Having thus established that Scott's intention was irrelevant to determine whether the Obscene Publications Act had been breached, Cockburn CJ proceeded to formulate the appropriate standard to establish whether material is obscene under common law. He declared:

"I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."²⁸

This rather brief formulation led Cockburn CJ to conclude that the nature of the seized publication was such that it would indeed suggest in the minds of both young and old persons "thoughts of a most impure and libidinous character."²⁹ Therefore, apart from the ulterior object which the publisher of the pamphlet had in mind, the work was "in every sense of the term an obscene publication"³⁰ and constituted a breach of English statutory law. Consequently, the Recorder's judgment was reversed and the order of the magistrates whereby the pamphlets were seized was affirmed.³¹

The *Hicklin*-formula was naturally followed in all Anglo-American jurisdictions³² and in England itself, the decision of Cockburn CJ was cited with approval well into the 1950s. Although general consensus seemed to exist among members of the Queen's Bench during this period that "the law is the same now as it was in 1868",³³ some members of the English judiciary began to question the accuracy of this common law standard. In *Regina v Secker and Warburg*,³⁴ for example, the court chose instead to employ contemporary community standards with a view to determine whether the publication in question fell foul of the Obscene Publications Act.³⁵ This paved the way for the introduction of a new bill in 1957 to address the regulation of undesirable publications under English law. The new Obscene Publications Act - which expressly provided

²⁸ At 371 (*supra*).

²⁹ At 371 (*supra*).

³⁰ At 371 (*supra*).

³¹ At 372 - 272 (*supra*).

³² For examples where the *Hicklin*-formula was followed by United States courts, see par 3 3 3 n 58 (*infra*).

³³ Per Lord Goddard in *Regina v Reiter* (1954) 1 All ER 741.

³⁴ (1954) 2 All ER 683.

³⁵ 20 & 21 Vict c83 of 1857 (*supra*).

for a publication to be evaluated as a whole - was promulgated two years later.³⁶ This statutory requirement, together with the precedent established by the *Secker and Warburg* case, set Anglo-American obscenity law on its current path. Yet it still remains somewhat of a surprise that the common law approach to obscenity remained largely unchallenged³⁷ in United States constitutional jurisprudence for no less than eighty nine years. Since the enquiry at common law was not conducted against the backdrop of a constitutional democracy, its usefulness to United States law always remained limited at best. When in 1957 the United States Supreme Court was for the first time called upon to determine whether a federal statutory provision violated the guarantees of the First Amendment to the Constitution of the United States of America,³⁸ the Supreme Court could clearly no longer justify subscribing to a common law conception of obscenity which was ill suited to address the matter as one which may possibly affect fundamental constitutional rights. The primary challenge which confronted the Supreme Court was that it had to determine how the constitutional mould in which the debate was unavoidably cast in the United States was likely to affect its stance on the issue. Would fundamental individual rights and/or freedoms be implicated and if so, under which part of the United States Constitution should the issue accordingly be addressed? If the Supreme Court were to find that the matter had to be dealt with under the First Amendment to the United States Constitution, the court would obviously have to determine whether or not obscenity enjoys First Amendment protection. These matters could - in turn - only be resolved once the Supreme Court had agreed on the appropriate standard for the determination of obscenity. Would the investigation by the Queen's Bench in *Regina v Hicklin* into the effect of obscene materials on particularly susceptible persons suffice or would a more appropriate standard have to be established by the Supreme Court?

Samuel Roth v The United States of America (*Roth v United States* in short)³⁹ was the first of two

³⁶ Section 1(1) of the 1959 Act read: "An article shall be deemed obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

³⁷ See par 3 3 3 n 58 (*infra*).

³⁸ The First Amendment to the Constitution of the United States (which was added to the Constitution in 1791) reads: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*" My emphasis.

³⁹ 354 US 476 (1957).

leading decisions of the United States Supreme Court (set sixteen years apart)⁴⁰ which sought to address these matters by establishing a golden mean between the First Amendment guarantees of freedom of speech and the press and the recognised right of federal member states to proscribe specific categories of sexually explicit material.⁴¹ In the next paragraph, I shall examine the highlights in the obscenity jurisprudence of the United States Supreme Court over a period of forty years more closely.

3 3 OBSCENITY AND THE FIRST AMENDMENT: UNITED STATES SUPREME COURT JURISPRUDENCE

It was pointed out in Chapter 2 of this dissertation that American constitutional law is founded on liberal thought.⁴² The liberal core of the First Amendment to the Constitution of the United States of America has long been affirmed by the United States Supreme Court. In *Roth v United States* the Supreme Court went to some length to trace the history and scope of the guarantee of freedom of speech in United States constitutional jurisprudence so that by linking the guarantees afforded by the First Amendment to the “unfettered interchange of ideas of redeeming social importance”,⁴³ the Supreme Court could justify the exclusion of obscenity from the protection intended for free speech and the press. The constitutionalisation of obscenity law has indeed become the enduring legacy of *Roth v United States*.

3 3 1 The Facts in *Roth v United States*

The Supreme Court had to determine whether the provisions of a federal obscenity statute⁴⁴ violated the provisions of the First Amendment which affords protection to freedom of speech

⁴⁰ The other watershed decision of the United States Supreme Court (which set the current standard for obscenity) is *Marvin Miller v The State of California* 413 US 15 (1973). For a full discussion of this case, see par 3 3 4 and accompanying footnotes (*infra*).

⁴¹ This right is expressly recognised by the United States Supreme Court: see par 3 3 2 n 61 and also par 3 3 6 n 95 (*infra*).

⁴² For a discussion of the basic tenets of liberal thinking, see Chapter 2 of this dissertation par 2 3 1 and accompanying footnotes (*supra*). See also, in general, Jefferson Powell “Reviving Republicanism” 1988 97 *Yale Law Journal* 1703.

⁴³ At 484 (*supra*).

⁴⁴ 18 USC par 1416.

and of the press against laws of Congress.⁴⁵ The relevant part of the federal statute provided that “obscene, lewd, lascivious, filthy or indecent material” may not be distributed through the postal system and that “whoever knowingly deposited such material for mailing or delivery” is punishable by criminal law.⁴⁶ Samuel Roth conducted a business in New York in the publication and sale of books, photographs and magazines. Since Roth used circulars and advertisements to solicit sales, he was convicted by a jury in the District Court for the Southern District of New York upon four counts of a twenty six count indictment that charged him with mailing obscene circulars and advertising and an obscene book in violation of the aforementioned federal statute. His conviction was affirmed by the Court of Appeals for the Second Circuit.⁴⁷ After Roth’s subsequent application for bail was granted,⁴⁸ he lodged an appeal against his conviction with the United States Supreme Court.

3 3 2 The Decision of the Supreme Court

Brennan J delivered the principal opinion of the Supreme Court.⁴⁹ He commenced his assessment by pointing out that although the Supreme Court had always *assumed* that obscenity was not protected by the First Amendment,⁵⁰ this was the first occasion on which the court had to consider whether obscenity falls within the area of constitutionally protected speech and the press.⁵¹ After tracing the history of the right to freedom of speech in the United States,⁵² Brennan

⁴⁵ For the full text of the First Amendment to the United States Constitution, see par 3 2 2 n 38 (*supra*).

⁴⁶ 18 USC par 1416 (*supra*).

⁴⁷ 237 F2d 796 (1956).

⁴⁸ Harlan J granted the application for bail in his capacity as Circuit Judge for the Second Circuit: see 1 L ed 2d 34; 77 S Ct 17 (1956).

⁴⁹ At 494 - 508; Douglas J and Black J dissenting at 508 - 514 (*supra*).

⁵⁰ See, *inter alia*, *Ex parte Jackson* 96 US 727 at 736 - 737; *United States v Chase* 135 US 255 at 261; *Robertson v Baldwin* 165 US 275 at 281; *Public Clearing House v Coyne* 194 US 497 at 508; *Hoke v United States* 22 US 308 at 322; *Near v The State of Minnesota* 28 US 697 at 716; *Chaplinsky v New Hampshire* 315 US 568 at 571 - 572; *Hannegan v Esquire Inc* 327 US 145 at 158; *Winters v The State of New York* 333 US 507 at 510; and *Beauharnais v The State of Illinois* 343 US 250 at 266.

⁵¹ At 481 (*supra*).

⁵² Ever since the adoption of the First Amendment in the eighteenth century, Brennan J found that freedom of expression was guaranteed in ten of the fourteen states which by 1792 had ratified the United States Constitution. Whereas thirteen of the aforementioned fourteen states provided for the prosecution of libel, all thirteen states proscribed either blasphemy or

J found “sufficient evidence”⁵³ to show that obscenity was indeed situated outside the protection intended by the founding fathers of the United States Constitution. He explained that the protection afforded to speech and the press in United States constitutional jurisprudence was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes. Consequently, all ideas that have even the *slightest* redeeming social importance - “unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion”⁵⁴ - have the full protection of the First Amendment guarantee. But implicit in the history of the First Amendment, Brennan J argued, was the rejection of obscenity as “utterly without redeeming social importance.”⁵⁵ This rejection was mirrored in the “universal belief” that obscenity should be restrained, a belief which was on occasion articulated by the United States Supreme Court as follows:

“[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit which may be derived from them is clearly outweighed by the social interest in order and morality”.⁵⁶

On the basis of this *dictum* and in light of the legislative history of the First Amendment, Brennan J therefore concluded that obscenity does not fall within the area of constitutionally protected speech or the press.⁵⁷

profanity. As early as 1712, the State of Massachusetts made it a criminal offense to publish “any filthy, obscene, or profane song, pamphlet, libel or mock sermon” in imitation or mimicking of religious services: see Acts and Laws of the Province of Massachusetts Bay c CV of 1712 par 8 and Massachusetts Bay Colony Charters & Laws 399 of 1814.

⁵³ See, in particular, the Act Concerning Crimes and Punishments of 1821 par 69; Statutory Laws of Connecticut 109 of 1824; *Knowles v State* 3 Day 103 (Conn 1808); Revised Statute of 1835 chapter 130 par 10; Revised Statute of Massachusetts 740 of 1836; *Commonwealth v Holmes* 17 Mass 335 of 1821; Revised Statute of 1842 chapter 113 par 2; Revised Statute of New Hampshire 221 of 1843; the Act for Suppressing Vice and Immorality par XII of 1798; New Jersey Revised Laws 329 of 1800; and *Commonwealth v Sharpless* 2 Serg & R 91; 7 Am Dec 632 (Pa 1815).

⁵⁴ At 484 (*supra*).

⁵⁵ At 485 (*supra*).

⁵⁶ See *Chaplinsky v New Hampshire* at 568 (*supra*).

⁵⁷ At 485 (*supra*). Even though it was now established by the Supreme Court that obscenity deserves no constitutional protection, Brennan J nevertheless still had to determine whether a clear and present danger must exist before obscenity is punishable by law. In an attempt to resolve this issue, he relied on *Beauharnais v The State of Illinois* (*supra*) where the Supreme Court held that if utterances are not within the area of constitutionally protected speech, it

3 3 3 The Supreme Court's Definition of Obscenity

Since Brennan J was satisfied that the issue of obscenity had to be addressed under the First Amendment to the United States Constitution, the biggest challenge which confronted him was the formulation of a standard of obscenity which would satisfy the constitutional demands imposed by the First Amendment. In his brief assessment of the standard of obscenity under common law, Brennan J found that some United States courts had initially adopted the test established by the Queen's Bench in *Regina v Hicklin*.⁵⁸ Later decisions, however, rejected this standard and substituted it with a test designed to determine whether by applying contemporary community standards, the dominant theme of the material taken as a whole would appeal to prurient interests.⁵⁹ Brennan J's main dissatisfaction with the standard established by the Queen's Bench was that it might well target material "legitimately treating with sex."⁶⁰ The existence of such a possibility, Brennan J argued, meant that the *Hicklin*-standard had to be rejected as it would inevitably encroach upon the constitutional guarantees entrenched by the First Amendment. Although not expressly stated in his judgment, the reason advanced by Brennan J for his rejection of the standard set out in *Regina v Hicklin* reveals that he draws a distinction between material which is *merely* sexually explicit as opposed to material which is *obscene*. Consequently, sexually explicit material is only obscene if it "deals with sex in a manner appealing to prurient interest."⁶¹ In other words, it is "material having a tendency to

becomes unnecessary for the court to consider whether these present a clear and present danger. In light of this precedent, Brennan J did not, therefore, find it necessary to first show that obscene materials create a clear and present danger of, for example, anti-social conduct before these may be punishable by state or federal law.

⁵⁸ (1868) LR 3 QB 360: see *United States v Kennerley* (DC NY) 209 F 119; *MacFadden v United States* (CA3d NJ) 165 F 51; *United States v Bennett* (CC NY) 16 Blatchf 338; *United States v Clarke* (DC Mo) 38 F 500; and *Commonwealth v Buckley* 200 Mass 346 86 NE 910. See also par 3 2 2 (*supra*).

⁵⁹ This new standard was, *inter alia*, applied in *Walker v Popenoe* 80 App DC 129; *Parmelee v United States* 72 App DC 203; *United States v Levine* (CA2d NY) 83 F2d 156; *United States v Dennett* (CA NY) 39 F2d 564; *Kahn v Leo Feist Inc* (DC NY) 70 F Supp 4; *United States v One Book Called "Ulysses"* (DC NY) F Supp 182; *American Civil Liberties Union v Chicago* 3 Ill2d 334; *Commonwealth v Isenstadt* 318 Mass 543; *Missouri v Becker* 364 Mo 1079; *Adams Theatre Co v Keenan* 12 J 267; *Bantam Books Inc v Melko* 25 NJ Super 292; *Commonwealth v Gordon* 66 Pa D&C 10 affirmed; and *Roth v Goldman* (CA2d NY) 172 F2d 78 794 at 795.

⁶⁰ At 489 (*supra*).

⁶¹ At 487 (*supra*).

excite lustful thoughts.”⁶² This distinction led Brennan J to conclude that no significant difference exists between the meaning of obscenity developed in United States case law prior to 1957 and the definition contained in the United States Model Penal Code. The definition of obscenity in Paragraph 207.10(2) of the Model Penal Code read:

“[a] thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits or candour in description or representation of such matters.”⁶³

Brennan J realised, however, that this conception of obscenity would raise an obvious constitutional problem in instances where art, literature or scientific works contain sexually explicit images. He circumvented this potential problem by categorising works of science, art and literature as “matters of public concern”⁶⁴ and arguing that the portrayal of sex would not constitute sufficient reason to deny these works constitutional protection because the freedom of speech and press guarantee afforded by the First Amendment would embrace the “liberty to discuss these matters publicly and truthfully without previous restraint or fear of subsequent punishment.”⁶⁵ And since it is accordingly “vital that the standard for judging obscenity safeguards the protection of a free press and speech for material which does not treat sex in a manner appealing to prurient interest,”⁶⁶ Brennan J found that the trial court had indeed sufficiently followed the proper standard and definition of obscenity.⁶⁷ He also found that the trial judge rightly instructed the jury that the appropriate test for obscenity was not whether the material in question would arouse sexual desires or sexual impure thoughts in a particular segment of the community but that the effect of the material had to be considered as a whole upon all those whom it is likely to reach instead. Brennan J could therefore come to no other conclusion than to reject the appeal under consideration and affirm the judgment of the trial court.⁶⁸

⁶² 1 L ed 2d 1498 at 1508 n 20.

⁶³ The Model Penal Code Tenth Draft No 6 of 1957.

⁶⁴ At 487 (*supra*), citing *United States v Dennett* (*supra*).

⁶⁵ See *Thornhill v The State of Alabama* 310 US 88 at 101 - 102.

⁶⁶ At 488 (*supra*).

⁶⁷ At 490 (*supra*). The trial judge had in fact applied the test laid down in *The People v Wepplo* 78 Cal App 2d Supp 959, namely whether the material has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.

⁶⁸ At 494 (*supra*).

3 3 4 A Period of Legal Uncertainty: United States Supreme Court Obscenity Jurisprudence between 1957 and 1973

After the Supreme Court's decision in *Roth v United States*, no majority of the court could seem to agree on a standard to determine what would constitute obscene material subject to regulation under United States constitutional law. The period 1957 to 1973 therefore saw "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication."⁶⁹ In the absence of a majority view, the Supreme Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials under federal statutory law that at least five members of the court - each applying their separate tests - found to be protected by the First Amendment.⁷⁰ This practice meant that the Supreme Court was cast in the role of an arbitrary board of censorship for the (then) fifty member states, subjectively judging each piece of material brought before it. One matter that was, however, categorically settled by the Supreme Court during this period was that obscene material enjoyed no protection under the First Amendment. Then nine years after its decision in *Roth v United States*, the Supreme Court veered sharply away from the *Roth*-conception of obscenity and articulated a new constitutional standard in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v Attorney General of Massachusetts*, popularly known as *Memoirs v Massachusetts*.⁷¹ The majority of the Supreme Court held that under the *Roth*-definition

"as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."⁷²

The third element (of what became known as the *Memoirs* test) which required that the material in question must be utterly without redeeming social value, constituted a sharp break with the standard established in 1957. This was further underscored when the majority of the court in *Memoirs v Massachusetts* expressly stated that material need not be "unqualifiedly worthless before it can be deemed obscene," with the result that material could not be proscribed unless it

⁶⁹ Per Harlan J (concurring and dissenting) in *Interstate Circuit Inc v Dallas* 390 US at 704 - 705.

⁷⁰ This practice was first embarked on in *Redrup v The State of New York* 386 US 767 (1967). Although thirty one cases were decided in this manner, no justification had ever been offered in support of this "policy" beyond the necessity of circumstances: see, for example, *Walker v The State of Ohio* 398 US 434 (1970) at 435.

⁷¹ 383 US 413 (1966).

⁷² At 418 (*supra*).

was found to be *utterly* without redeeming social value.⁷³ Therefore, whereas the *Roth* decision *presumed* obscene material to be without redeeming social importance,⁷⁴ the standard established in *Memoirs v Massachusetts* required that it must be affirmatively established that the material *is* utterly without redeeming social value.⁷⁵ The majority of the Supreme Court now effectively called on the prosecution to prove a *negative* - a burden later found virtually impossible to discharge under the United States standard of proof in criminal proceedings.⁷⁶ These difficulties caused Harlan J in his dissenting opinion in *Memoirs v Massachusetts* to question whether the phrase "utterly without redeeming social value" has any legal meaning at all.⁷⁷

By the early 1970s, general uncertainty prevailed among the members of the Supreme Court on the appropriate constitutional standard of obscenity. By this time, Brennan J (the leading author of the majority opinions of the Supreme Court since 1957)⁷⁸ had not only abandoned his former position established in *Roth v United States*,⁷⁹ but the formula proposed in *Memoirs v Massachusetts* also no longer enjoyed support from the members of the court either. Brennan J seemed to have reached the conclusion that no formulation by either the Supreme Court or United States legislature could adequately distinguish obscene material unprotected by the First Amendment from protected categories of expression.⁸⁰ Then in 1973, the United States Supreme

⁷³ At 419 (*supra*). Emphasis in the original.

⁷⁴ At 487 (*supra*).

⁷⁵ At 418 (*supra*).

⁷⁶ See par 3 4 4 3 (*infra*).

⁷⁷ At 459 (*supra*).

⁷⁸ In *Roth v United States* (*supra*); *Jacobellis v The State of Ohio* (*supra*); *Ginzburg v United States* 383 US 463 (1966); *Mishkin v New York* 383 US 502 (1966); and *Memoirs v Attorney General of Massachusetts* (*supra*).

⁷⁹ Brennan J parted ways with his earlier views on an appropriate constitutional standard for obscenity in *Paris Adult Theatre I v Slaton* 413 US 49 at 73 (1973). See also par 3 4 3 n 152 (*infra*).

⁸⁰ In his dissenting opinion in *Paris Adult Theatre I v Slaton* (*supra*), Brennan J eventually conceded that it is impossible to define the term obscenity satisfactorily due to its inherent vagueness. Consequently, he argued that a definition of obscenity must be drawn as narrowly as possible so as to both minimise the interference with protected categories of expression and to provide sufficient clarity and notice to persons who create and distribute sexually oriented materials. This about-turn by Brennan J seems to indicate that although he thought that the suppression of constitutionally unprotected obscene material was permissible to avoid exposure to unconsenting adults and minors, he gave no indication of how the division between protected and unprotected materials may be drawn with greater precision or how the interests of unconsenting adults are to be reconciled with the interests of consenting

Court was called upon to review a group of obscenity cases⁸¹ in a re-examination of the standards enunciated in earlier cases involving what Harlan J on occasion exasperatedly referred to as "the intractable obscenity problem."⁸² *Marvin Miller v The State of California* (or *Miller v California* in short)⁸³ was one of the aforementioned group of obscenity cases under review. In this case the Supreme Court set out to formulate basic guidelines which constitute the current standard for obscenity employed by United States courts.

In certain respects, *Miller v California* constitutes an interesting departure from the Supreme Court's obscenity jurisprudence of the preceding twenty one years.⁸⁴ This case, for example, constitutes the first acknowledgement ever by the United States Supreme Court of the term "pornography."⁸⁵ Since the Supreme Court standard for obscenity would henceforth only target "patently offensive hard core sexual conduct"⁸⁶ or "hard core pornography,"⁸⁷ material no longer needs to be "utterly without redeeming social value" to fall foul of the First Amendment.⁸⁸ And since obscenity is forthwith to be determined by applying contemporary community standards (instead of "unascertainable" national standards),⁸⁹ federal legislatures can justifiably proscribe obscenity if the danger exists of offending the "sensibilities" of unwilling (adult) recipients of "sexually oriented material" or of exposure thereof to minors.⁹⁰ A closer inspection of the

adults.

⁸¹ The Supreme Court fleshed out its new standard for obscenity on the same day in five companion decisions. The decisions in question were *Miller v The State of California* (*supra*); *United States v Orito* 413 US 139 (1973); *United States v 12 000 Ft Reels of Super 8 MM Film* 413 US 123 (1973); *Kaplan v The State of California* 413 US 115 (1973); and *Paris Adult Theatre I v Slaton* (*supra*).

⁸² In *Interstate Circuit Inc v Dallas* at 704 (*supra*).

⁸³ 413 US 15 (1973).

⁸⁴ That is, since its 1942 decision in *Chaplinsky v New Hampshire* (*supra*).

⁸⁵ A particular category of pornographic material - which the court set forth to define - was included under so-called "obscene expression" in a footnote of Burger CJ's opinion at 18 n 2 (*supra*).

⁸⁶ At 27 (*supra*).

⁸⁷ At 29 (*supra*).

⁸⁸ The third prong of the *Memoirs v Attorney General of Massachusetts* standard (*supra*) was expressly rejected at 24 (*supra*).

⁸⁹ At 31 (*supra*).

⁹⁰ At 19 (*supra*).

Supreme Court's watershed decision now follows.

3 3 5 The Facts in *Miller v California*

Marvin Miller conducted a mass mailing campaign to advertise the sale of illustrated books under the genre of "adult" material. After a jury trial in a California State Court, the defendant was convicted of a misdemeanour in violation of the California Penal Code⁹¹ for the distribution of five unsolicited advertising brochures through the mail to a restaurant in Newport Beach, California. The unsolicited package was opened by the manager of the restaurant who subsequently lodged a complaint with the police. The brochures - which advertised four books and a film⁹² - consisted primarily of explicit pictures and drawings depicting men and women in groups of two or more engaging in a variety of sexual activities with genitals often prominently displayed. The Appellate Department of the Superior Court of California (County of Orange) summarily affirmed the judgment without opinion.⁹³ The matter was subsequently reviewed by the Supreme Court.

3 3 6 The Opinion of the Supreme Court

From the onset, Burger CJ - who delivered the principal opinion of the court⁹⁴ - recognised that states have a legitimate interest to prohibit the dissemination or exhibition of obscene material when the mode of dissemination carries a "significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."⁹⁵ Yet for the first time in the history of the Supreme Court's jurisprudence, the court strayed from the exclusive use of the term "obscenity."

⁹¹ Under par 311 subpar 311.2(a) of the California Penal Code.

⁹² The four books and one film were respectively entitled *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, *An Illustrated History of Pornography* and *Marital Intercourse*.

⁹³ 37 L Ed 2d 419 (1973).

⁹⁴ Douglas J, Brennan J, Stewart J and Marshall J dissenting at 37 - 48 (*supra*).

⁹⁵ At 19 (*supra*); relying on *Stanley v The State of Georgia* 394 US 557 (1969) at 567; *Ginzberg v New York* 390 US 629 (1968) at 637; *Interstate Circuit Inc v Dallas* at 690 (*supra*); *Redrup v New York* 386 US 767 (1967) at 769; *Jacobellis v The State of Ohio* at 195 (*supra*). See also *Rabe v Washington* 405 US 313 (1972) at 317; *United States v Reidel* 402 US 351 (1971) at 360 - 362; *Joseph Burstyn Inc v Wilson* 343 US 495 (1952) at 502; *Breard v Alexandria* 341 US 622 (1951) at 644 - 645; *Kovacs v Cooper* 336 US 77 (1949) at 88 - 89; and *Prince v The State of Massachusetts* 321 US 158 (1944) at 169 - 170.

In a footnote of his judgment,⁹⁶ Burger CJ observed that the material under discussion⁹⁷ could be more accurately defined as “pornography” or “pornographic material.” Yet “pornography” appears to bear a wider meaning than “obscenity” in the Chief Justice’s understanding. Pornographic material which is obscene, Burger CJ argued, forms a *sub-group* of all obscene expression. The words “obscene material” thus have a specific *legal* meaning which is derived from *Roth v United States*, namely “obscene material which deals with sex.”⁹⁸ Since Burger CJ clearly conceptualises “pornography” on the basis of whether it would enjoy constitutional protection under the First Amendment, it follows that pornographic material which is obscene would not enjoy any protection under the standard and rationale established in the *Roth* case. But even though Burger CJ reaffirmed the constitutional position on obscenity established by the Supreme Court in 1957, he still saw the need to formulate more “concrete standards” than those produced by the “somewhat tortured history of the court’s obscenity decisions.”⁹⁹ To realize this objective, Burger CJ confined the Supreme Court’s enquiry in the present case to works which depict or describe *sexual conduct*¹⁰⁰ and set forth to formulate the Supreme Court’s eagerly awaited new standard of obscenity as follows:

“[t]he basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’¹⁰¹ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. We do not adopt as a constitutional standard the ‘utterly without redeeming social value’ test of *Memoirs v Massachusetts*.”¹⁰²

Without giving any reasons, the Chief Justice seemed satisfied that a definition of obscenity within these parameters will be compatible with the demands posed by both the First and Fourteenth Amendments to the United States Constitution. Moreover, he expressed confidence that the new standard ought not only to provide fair notice to a dealer in obscene, hard core pornographic material that his public and commercial activities may result in prosecution, but also ought to alleviate the tension which legal uncertainty has produced between state and federal

⁹⁶ At 18 n 2 (*supra*).

⁹⁷ See n 92 (*supra*).

⁹⁸ At 487 (*supra*).

⁹⁹ At 20 (*supra*).

¹⁰⁰ At 24 (*supra*).

¹⁰¹ *Kois v Wisconsin* 408 US 229 (1972) at 230, quoting *Roth v United States* at 489 (*supra*).

¹⁰² At 24 (*supra*).

courts.¹⁰³ It will however, Burger CJ argued, remain the function of individual states to produce their own regulation for obscene material and since only “patently offensive hard core sexual conduct”¹⁰⁴ will be targeted under this new standard, individual states will be required to formulate their own definition of sexual conduct. Burger CJ was, however, prepared to shed some light on the matter by producing a few “plain examples” of what a state statute could define for regulation under part (b) of the Supreme Court’s new standard for obscenity. Possible definitions could therefore include reference to “patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated” and “patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals.”¹⁰⁵

Burger CJ then proceeded to assess the relevant standard to be applied by a United States court when considering whether sexually explicit material appeals to the prurient interest or is patently offensive. He pointed out that although the limitations imposed by the United States Constitution in general (and First Amendment in particular) do not vary from community to community, it does not necessarily follow that fixed, uniform national standards of these two notions exist. Due to the size and diversity of the American nation, prurience and offensiveness are essentially questions of fact and it would therefore be unrealistic to assume that a degree of national consensus exists that could lead the Supreme Court to produce a single standard for all member states. Burger CJ therefore concluded that the relevant contemporary community standards to be applied in the present instance were those of the State of California.¹⁰⁶ The Chief Justice advanced two reasons for this conclusion. First, he could find nothing in the First Amendment which required that a jury must consider hypothetical national standards when seeking to determine whether certain materials are obscene as a question of fact and secondly, since people differ in their tastes and attitudes, Burger CJ thought it imperative to judge the impact of material on an average person rather than a particularly susceptible or sensitive person as was required under common law.¹⁰⁷ Consequently, works which taken as a whole have serious literary, artistic, political or scientific value will enjoy protection under the First Amendment, regardless of whether the United States government or a majority of the American people approve of the ideas these works represent. It follows, therefore, that the “public portrayal of hard core sexual conduct for its own sake” (and for the ensuing commercial gain) will not enjoy similar

¹⁰³ At 27 (*supra*).

¹⁰⁴ At 27 (*supra*).

¹⁰⁵ At 25 (*supra*).

¹⁰⁶ At 31 (*supra*).

¹⁰⁷ At 31 (*supra*), citing *Mishkin v New York* at 508 - 509 (*supra*). See also par 3 2 (*supra*).

constitutional protection.¹⁰⁸ Consequently, the judgment of the Appellate Department of the Superior Court, Orange County California was set aside and the case was remanded to that court for further proceedings consistent with the new standard established by the Supreme Court's opinion.

3 4 A CRITICAL ASSESSMENT OF THE CONCEPTION OF PORNOGRAPHY EMPLOYED BY THE UNITED STATES SUPREME COURT

The United States Supreme Court's conception and treatment of obscenity or, to use its own terminology, "hard core pornography"¹⁰⁹ is problematic for a number of reasons. The previous chapter was intended to highlight the theoretical shortcomings of engaging a liberal paradigm in an investigation into the constitutional implications of adult heterosexual pornography within a discourse on women's fundamental rights and freedoms. Apart from the concerns which I have expressed in the course of that discussion,¹¹⁰ two *additional* aspects of the Supreme Court's obscenity jurisprudence raise particular difficulties in respect of the two constitutional arguments that I intend to employ against pornography in the present study.¹¹¹

The first problematic aspect of the Supreme Court's conception of obscenity is related to the court's justification for examining the matter under the First Amendment to the Constitution of the United States. In the discussion that follows below, I shall give particular attention to the court's intellectual and philosophical justification of freedom of expression and its constitutional consequences.¹¹² The second part of my assessment will seek to highlight the shortcomings of a libertarian conception of harm, coupled with the standard that was proposed by the Supreme Court in *Miller v California*.¹¹³ The validity of many of the assumptions¹¹⁴ that underpin the Supreme Court's obscenity jurisprudence appears not merely insensitive, but indeed oblivious to the dynamics of patriarchy in relation to the actual social realities of women in a legal and

¹⁰⁸ At 30 (*supra*).

¹⁰⁹ *Per* Burger CJ at 29 (*supra*).

¹¹⁰ See Chapter 2 of this dissertation par 2 3, especially par 2 3 1 - 2 3 3 (*supra*).

¹¹¹ See par 3 1 n 10 (*supra*).

¹¹² See par 3 4 1, especially par 3 4 2 - 3 4 3 and accompanying footnotes (*infra*).

¹¹³ See par 3 4 4, especially par 3 4 4 1 - 3 4 4 3 and accompanying footnotes (*infra*).

¹¹⁴ See, in general, Thomas Scanlon "A Theory of Free Expression" 1972 1 *Philosophy and Public Affairs* 204.

political society founded on libertarian principles. The court therefore struggles to see that the very reason why adult heterosexual pornography could be construed as a problem within a discourse on women's constitutional rights and freedoms may in some way be related to the tenets of individuality, autonomy¹¹⁵ and neutrality¹¹⁶ which indeed sustains its conception of obscenity. Consequently, the validity of the court's assumptions about the nature of debate (and ideas), the function of the state and the degree of autonomy and power enjoyed by individuals in the liberal state warrants serious reconsideration.

The Supreme Court's obscenity jurisprudence is characterised by two key features. First, the court subscribes to an abstract concept of free speech (which proceeds from the assumption that all speech is of equal value) and thereby surmises that non-obscene pornography has social value, as do esteemed works of literature and art. Secondly, the court assumes that all individuals have equal access to the means of expression and dissemination of ideas and thus fails to acknowledge substantive structural inequalities. The court ought to be aware that systemic inequalities make it difficult for some individuals to express their views, if not in practice then at least in theory. Consequently, the much favoured liberal argument that more speech should be allowed as a means to rectify such imbalances¹¹⁷ could thus in reality serve to exacerbate a deeply entrenched system of inequality. It is an utter fallacy to presume that freedom of expression is possessed by men and women - or even different racial or ethnic groups - in equal measure. Due to systemic gender inequality, women find it difficult to enjoy the full benefits of free speech.

The structural powerlessness of women is a crucial determinant of the degree to which women have access to the means of expression. For one, they lack the resources required to articulate their unique experiences with the result that women are effectively excluded from public discourse. The marketplace of ideas-paradigm¹¹⁸ is both philosophically and in practice linked to the idea of capitalism. In reality, it serves to accommodate those with the most power and ultimately gives them access to the widest dissemination of their ideas. Women are furthermore silenced through sexual abuse and violence which render it difficult to articulate their own experiences in a *credible* way. The manner in which criminal law treats a female complainant

¹¹⁵ On autonomy and abstract individualism as core elements of liberal thought, see Chapter 2 par 2 3 1 of this dissertation and accompanying footnotes (*supra*).

¹¹⁶ On the significance of state and content neutrality in United States First Amendment jurisprudence, see par 3 5 1 4 and accompanying footnotes (*infra*).

¹¹⁷ This anti-censorship argument was first articulated by Brandeis J in *Whitney v The State of California* 274 US 357 (1927) at 377 who argued that the appropriate remedy for the harms produced by speech is "more speech, not enforced silence".

¹¹⁸ See par 3 4 2 n 135 (*infra*).

in a rape or sexual harassment case underscores my point. For centuries under patriarchal rule, the testimony of a woman who alleges rape or indecent assault was subjected to the cautionary rule in the Anglo-American system of evidence. As in the case of children, the testimony furnished by a female complainant in sexual proceedings had to be viewed with suspicion and approached with caution.¹¹⁹ Her testimony was thought to raise particular problems of corroboration even though the danger of a false charge would ultimately be balanced by the normal incidence of the onus which serves to protect the accused in criminal proceedings. The Supreme Court does not seem mindful of the fact that an abstract system of free speech lacks the substantive means to empower those who have systematically been excluded from public discourse on the basis of race and/or sex. It is a historical fact that the First Amendment to the United States Constitution - together with its values of individuality, autonomy and neutrality - existed in harmony with both institutionalised slavery and (racial) segregation. No effective legal challenge to these two systems of racial subordination was ever mounted under the rubric of free expression, even though literacy tests were used in the United States to screen the eligibility of voters.¹²⁰ Since segregated separate-but-equal-education assured that African Americans remained vastly illiterate, they had no reasonable opportunity to meet the literacy requirements in order to participate in a fundamental part of the political process.¹²¹ An abstract system of free speech cannot, therefore, be the legal priority for any system characterised by institutionalised racial and gender oppression. I agree with Andrea Dworkin who argues that

“[i]f equality interests can never matter against first amendment challenges, then speech becomes a weapon used by the haves against the have-nots; and the First Amendment, not balances against equality rights of the have-nots, becomes an intolerable instrument of dispossession, not a safeguard of human liberty.”¹²²

The investigation launched by the South African Human Rights Commission into racism in the

¹¹⁹ See, in general, LH Hoffmann and D Zeffertt “Sufficiency of Evidence” in *The South African Law of Evidence* (1988) 566 at 579 - 580.

¹²⁰ See, for example, *The State of Oregon v Mitchell* 400 US 112 (1970) at 132 - 133.

¹²¹ See *Gaston County v United States* 395 US 285 (1969) and *CF Griggs v Duke Power Company* 410 US 424 (1971) at 430. See also CE Baker “The Process of Change and the Liberty of the First Amendment” 1982 55 *Southern California Law Review* 293.

¹²² See “Brief *Amicus Curiae* of Andrea Dworkin in *American Booksellers v Hudnut*, Indianapolis, Indiana” in C MacKinnon and A Dworkin (eds) *In Harm's Way: The Pornography Civil Rights Hearings* (1997) 314 at 319 (hereinafter referred to as *In Harm's Way*).

South African media further underscores my point.¹²³ Submissions before a public hearing of the Commission by black editors and journalists highlighted racial stereotyping, marginalisation and prejudice in the still predominantly white owned South African media. Submissions by the latter largely denied that these problems continue to exist.¹²⁴ It need not be argued that free speech - to the extent that it occurred in apartheid South Africa - was largely conceived to secure a particular political end, namely to entrench institutionalised racism and sexism as a means to secure patriarchal minority rule.¹²⁵ Since speech was intended to entrench the political *status quo*, those groups in South African society who did not enjoy fundamental freedoms prior to the adoption of the Interim Constitution in 1994,¹²⁶ appear not to have been secured these freedoms to the fullest extent in practice in post-apartheid South Africa either. It therefore makes no sense to assume that (previously) marginalised groups will enjoy the same measure of free speech through an abstract system, for an abstract system does not provide a substantive guarantee of free speech for those who were (and may continue to be) socially and politically disempowered. In a hierarchal society the speech of the (socially and politically) powerful group will inevitably dominate public discourse¹²⁷ and thus distort the "free" competition in the marketplace of ideas which effectively serves to maintain structural racial and sex inequality.

¹²³ The South African Human Rights Commission formally resolved to conduct an investigation into racism in the media at its twenty sixth Plenary Session held on November 11, 1998. This inquiry was conducted in terms of section 184(2)(a) of the South African Constitution, Act 108 of 1996.

¹²⁴ The Interim Report of the Human Rights Commission (dated November 21, 1999) presents an overview of the various submissions received by the Commission as well as the results of research that it commissioned. The Interim Report invited responses from both interested parties and those "adversely affected by what is contained in the report": see South African Human Rights Commission *Interim Report: Media Inquiry* at 1. Subsequent to the publication of this Report, public hearings were held in terms of section 15 of the Human Rights Act 54 of 1994: see *Government Gazette* 20837 of February 4, 2000 at 44.

¹²⁵ Submissions before the South African Truth and Reconciliation Commission highlighted how the South African media were both used and structured to promote white male supremacy: see "Institutional Hearing: The Media" *TRC Report* (1998) 4 at 165 - 198, Graeme Addison "Censorship of the Press in South Africa During the Angolan War: A Case Study of News Manipulation and Suppression" *TRC Report* (1998) 4 165 at 182 and "A Submission from the South African Union of Journalists to the TRC concerning the Role of the Media during the Apartheid Years" *TRC Report* (1998) 4 at 166.

¹²⁶ Act 200 of 1993. The Constitution of the Republic of South Africa (popularly referred to as the Interim Constitution) entered into force on April 27, 1994.

¹²⁷ See, in particular, Kathleen Lahey "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" 1984 - 1985 20(4) *New England Law Review* 649 at 652.

The two aspects of the United States Supreme Court's obscenity jurisprudence which raise particular difficulties are of course interrelated. The Supreme Court's standard of obscenity (namely its test in three parts) is, for example, the result of the philosophical framework that the court favours, coupled with its interpretation of the (modern) doctrine of free speech. The fact that the test established in *Miller v California* has been widely criticised, especially for lack of clarity and effectiveness,¹²⁸ means that American society is flooded with "non-obscene" sexually explicit material that indeed enjoys full constitutional protection. This very consequence puts the Supreme Court's rationale for the protection of material of this nature directly at issue.

I shall now proceed to discuss in greater depth the two aspects of United States constitutional jurisprudence which raise particular difficulties in respect of the liberal and radical feminist arguments that I intend to explore against adult heterosexual pornography.

3 4 1 Employing a Liberal Paradigm: The Modern Doctrine of Free Speech

The modern doctrine of free speech is sustained in United States law by three key principles which are embraced by the First Amendment. These principles are (state) neutrality, no discrimination on the basis of content and the demonstration of direct harm.¹²⁹ My exposition of the obscenity jurisprudence of the United States Supreme Court as it evolved over a period of more than forty years has shown that the court does not waver from its position that the issue should be addressed under the rubric of the First Amendment to the United States Constitution.¹³⁰ Thus in assessing whether material is legally obscene, the court is guided by the basic tenets of the doctrine of freedom of speech. Since the political and intellectual core of the free speech doctrine remains rooted in the premise that free speech is essential to an open and democratic society, the fundamental question which confronts such an analysis is whether the entrenchment of freedom of expression legitimately protects sexually explicit material. The United States stands alone - even among other (liberal) Western democracies - in the extraordinary degree to which its constitution protects freedom of expression and the press. This can to some degree be attributed to the fact that the United States Constitution - unlike the supreme constitutions of for

¹²⁸ See par 3 4 4 and accompanying footnotes (*infra*).

¹²⁹ On the libertarian conception of harm and injury, see par 3 4 4 and accompanying footnotes (*infra*). See also Baker "Scope of the First Amendment Freedom of Speech" 1978 25 *University of California Los Angeles Law Review* 964.

¹³⁰ See par 3 3 and accompanying footnotes (*supra*).

example Canada,¹³¹ Germany¹³² and South Africa¹³³ - contains no general limitation clause. The absence of a general limitation clause has compelled the United States Supreme Court to allow for a limitation of rights and freedoms enshrined in the United States Constitution on an *ad hoc* basis, setting precedents restricted both in scope and content. This then in part accounts for the Supreme Court's conception of sexually explicit material that would enjoy protection under the First Amendment (namely material that falls outside the Supreme Court's standard of obscenity) as opposed to material that would not enjoy similar protection (so-called "obscene" or "hard core pornography"). This highly artificial conception of sexually explicit material that constitutes "speech" as opposed to that which constitutes "non-speech" in fact stems from the Supreme Court's *justification* of free speech. My discussion of the Supreme Court's jurisprudence has revealed that the court consistently holds that obscenity is not protected under the First Amendment.¹³⁴ However, the court's justification of why freedom of expression is such a fundamental freedom in a constitutional democracy and why non-obscene pornography consequently enjoys constitutional protection is highly suspect, both intellectually and philosophically. In the next paragraph, I shall examine the Supreme Court's philosophical justification for the protection of free speech in relation to so-called "hard core pornography" more closely.

3 4 2 The Supreme Court's Philosophical Justification for the Constitutional Protection of Freedom of Expression

John Stuart Mill's view that there exists an open marketplace of ideas is generally presented to explain the rationale behind the high ranking afforded to freedom of expression in Western constitutional jurisprudence.¹³⁵ Mill's marketplace of ideas paradigm facilitates the argument

¹³¹ See section 1 of the Canadian Charter of Rights and Freedoms of 1982 Part I.

¹³² See article 19 of the Basic Law for the Federal Republic of Germany of 1949 Chapter I.

¹³³ See section 36 of the Constitution of the Republic of South Africa 108 of 1996 (*supra*) Chapter 2.

¹³⁴ See par 3 3 and accompanying footnotes (*supra*).

¹³⁵ John Stuart Mill's open marketplace of ideas-metaphor was developed in the second chapter of his essay on the struggle between liberty and authority entitled *On Liberty*, first published in 1859. In the aforementioned chapter, Mill employs the so-called negative idea of liberty in his examination of freedom of opinion and of the press. Negative liberty is based on two key assumptions, namely that speech will naturally be free provided the state does not restrain it and secondly, that the important issue is the avoidance of restrictions on speech rather than affirmative access to speech for those to whom it has been denied historically. Constitutional rights and interests are

that the expression of any idea or emotion - regardless of whether true, contentious or false - represents a potential contribution to humankind's ongoing search for the truth and its desire to understand the world.¹³⁶ This much has long since been expressly affirmed in the Supreme Court's First Amendment obscenity jurisprudence.¹³⁷ To suppress the expression of a view or opinion is regarded as harmful to the quest for the truth and the First Amendment therefore - to quote Hand J - "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection".¹³⁸ Yet the First Amendment - like most clauses contained in a justiciable charter of fundamental rights - is by nature abstract and open-ended. It was pointed out in Chapter 1 of this dissertation that this also holds true in respect of the Bill of Rights in the South African Constitution.¹³⁹

In light of the abstract nature of the First Amendment and absence of a general limitation clause, constitutional interpreters in the United States must seek a *political* justification for the First Amendment that not only corresponds with previous constitutional practice (which includes Supreme Court precedents)¹⁴⁰ but also provides a compelling reason why United States constitutional law should grant freedom of expression such a privileged position among other liberties. Judges' understanding of the *justification* of the protection afforded to free speech is therefore crucial since it will guide their decision in so far as the First Amendment applies to non-political speech, notably art, commercial advertising and indeed sexually explicit material. Therefore, in order to determine whether the First Amendment, for example, protects racist or sexist speech, a judge of the United States Supreme Court will rely decisively on his understanding of the justification for the protection of freedom of expression in a liberal (open and free) democratic society.

thus interpreted *in relation to* state action and the guarantee of liberty is interpreted to exist *to the extent* that there is no state interference. The idea of negative liberty has subsequently become entrenched as a cornerstone of the modern liberal state.

¹³⁶ See "Of the Liberty of Thought and Discussion" in *On Liberty* (1859) 75 at 77.

¹³⁷ See especially *Chaplinsky v New Hampshire* (*supra*) and *Roth v United States* at 484 (*supra*).

¹³⁸ See *United States v Associated Press* 52 F Supp 362 at 372; cited in *New York Times v Sullivan* 376 US 254 (1964).

¹³⁹ On the meaning and possible significance of this on the process of constitutional interpretation, see Chapter 1 of this dissertation par 1.3 and accompanying footnotes (*supra*).

¹⁴⁰ See Frederick Schauer "The American Approach to the Law of Obscenity" in J Duncan (ed) *Between Speech and Silence: Hate Speech, Pornography and the new South Africa* (1996) 64 at 68 (hereinafter referred to as *Between Speech and Silence*).

John Stuart Mill's marketplace of ideas paradigm embraces two main justifications of the protection of freedom of expression.¹⁴¹ The first justification considers free speech as important *instrumentally*; the second views freedom of expression as an *essential and constitutive* feature of a just (liberal) political society.¹⁴² The instrumental justification of free speech is based on the assumption that truth is more likely to be discovered and error eliminated if a free exchange of ideas and open debate is allowed. Freedom of speech is not, therefore, protected because people have an intrinsic moral right to say what they wish, but because allowing them to do so is thought to produce good *political* consequences instead. If the power of the people to govern themselves is protected, government is less likely to become corrupt, for it will - at least in theory - lack the power to silence its critics.¹⁴³ All these justifications of freedom of speech are instrumental because they are based on the *assumption* that free speech will do more good than harm in the long run. The constitutive justification of free speech, on the other hand, sees this liberty as an essential feature of a society that treats its (adult) members as responsible moral agents. It supposes that freedom of speech is valuable both by virtue of its *consequences* and by virtue of the fact that it is an essential and constitutive feature of an equitable *political* society.¹⁴⁴ The constitutive justification of free speech - in turn - encompasses two dimensions. The first dimension requires that morally responsible individuals make up their own minds about what is good or bad or true and false in life, politics or matters of justice. It is thought to be desirable for human flourishing if matters of social, moral or intellectual development is left to the individual. Human beings will accordingly find the most suitable conditions for their own flourishing if the law adopts a neutral attitude towards matters of life, sexuality and politics. But moral responsibility has a second more active dimension as well. Moral responsibility is thought to not only denote the forming of one's own convictions, but also the expression of those convictions to others out of, *inter alia*, a compelling desire that the truth be known, justice served and the common good secured. The underlying assumption is thus that citizens have as much right to contribute to the establishment of the moral or aesthetic climate as they do to participate in politics.¹⁴⁵ Consequently, when government forbids the expression of some social attitude or

¹⁴¹ See Mill *On Liberty* (1852) 75. See also n 135 (*supra*).

¹⁴² See, in general, Johann van der Westhuizen "Freedom of Expression" in D van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (1996) 264 at 267 - 273 (hereinafter referred to as *Rights and Constitutionalism*) and Ronald Dworkin "Is there a Right to Pornography?" 1981 *Oxford Journal of Legal Studies* 177 at 178 - 179, 194 - 199. See also *Abrams v United States* 250 US 616 (1919) and *Whitney v The State of California* (*supra*).

¹⁴³ See Mill *On Liberty* 75 at 76 - 77 (*supra*).

¹⁴⁴ See Van der Westhuizen in D van Wyk et al *Rights and Constitutionalism* 264 at 269 - 270 (*supra*).

¹⁴⁵ See Dworkin 1981 *Oxford Journal of Legal Studies* 177 at 184 (*supra*).

taste or restricts explicitly political speech it effectively violates the moral responsibility of its people. The instrumental and constitutive justifications of freedom of expression are obviously not mutually exclusive and Mill indeed conceived of these as interrelated ideas.¹⁴⁶

Any analysis within the ambit of the First Amendment to the United States Constitution emanating from Mill's marketplace of ideas paradigm thus necessitates the recognition of both the instrumental *and* constitutive justification of freedom of expression. If the United States Supreme Court insists upon conducting its investigation into the extent to which sexually explicit material enjoys constitutional protection under the First Amendment, it will therefore have no option but to accommodate in its reasoning both the idea that free speech is important to the discovery of truth *and* that it is an essential feature of a just political dispensation. The Supreme Court will indeed only be able to explain fully the political objective of the First Amendment and justify its conception (and protection) of pornography as a mode of expression if it employs *both* types of justification of free speech.

The obscenity jurisprudence of the United States Supreme Court shows, however, that the court only relies upon the instrumental justification of freedom of speech. The Supreme Court, therefore, sees free speech as essential in the quest for truth and elimination of error in *politics*. Consequently, the one matter on which the Supreme Court has possessed consistent clarity is that obscenity falls outside the protection afforded to freedom of speech and the press by the First Amendment. Yet the firm reason advanced by the court over four decades constitutes nothing other than an instrumental ground. The Supreme Court *dicta* in obscenity cases conclusively underscores this point. By the court's own admission obscenity is thought to have "no redeeming social value";¹⁴⁷ to form "no essential part of any exposition of ideas"¹⁴⁸ and to "lack serious literary, artistic, political or scientific value."¹⁴⁹ In the next paragraph, I shall examine the possible constitutional consequences of the Supreme Court's justification of freedom of speech in relation to obscenity in more detail.

¹⁴⁶ As did Brandeis J in a dissenting opinion in *Whitney v The State of California* (*supra*). See also Scanlon 1972 1 *Philosophy and Public Affairs* at 204 (*supra*) where he developed a Kantian argument for the constitutive justification of freedom of expression. See also "Freedom of Expression and Categories of Expression" 1979 40 *University of Pittsburgh Law Review* 519 where Scanlon emphasizes the complex character of an account of the right to free speech and indeed concluded that instrumental and constitutive factors must both feature in a theoretical justification of free expression.

¹⁴⁷ See *Memoirs v Attorney General of Massachusetts* at 418 (*supra*).

¹⁴⁸ In *Chaplinsky v New Hampshire* at 571 (*supra*).

¹⁴⁹ In *Miller v California* at 24 (*supra*).

3 4 3 The Possible Constitutional Consequences of an Instrumental Justification of Freedom of Expression in relation to Pornography

The reason why it has proved enormously difficult for the United States courts (and its Supreme Court in particular) to distinguish obscenity from sexually explicit material that must have *some* redeeming value can be attributed squarely to the court's reliance on instrumental grounds as justification of freedom of expression. The Supreme Court has changed its mind about the ground of distinction so often and produced so many unworkable standards¹⁵⁰ that Stewart J's frank declaration that he could not define obscenity but knew it when he saw it¹⁵¹ has not surprisingly become the most quoted judicial pronouncement on the issue. The United States Supreme Court could rightly be seen as the main actor in undermining its stance and credibility on the issue of pornography. The intellectual basis that the court employs for freedom of speech, coupled with the court's conception of "hard core pornography", thus becomes highly suspect.¹⁵² The categories employed by the Supreme Court whereby constitutionally protected speech is distinguished from unprotected obscenity therefore seem arbitrary from the very perspective of the instrumental view of free speech that these categories are presumed to reflect. Consequently, the court's conception of obscenity can only be interpreted to the effect that the First Amendment must be understood to protect sexually explicit material on the forced (and easily rebuttable) assumption that citizens need such material in order to participate effectively in the *political* process. This understanding of the scope and object of the First Amendment facilitates the argument that pornography is essential to, for example, enable citizens to exercise their democratic right to vote and otherwise engage in politics in an informed and intelligent manner. If the intellectual and philosophical premise of the Supreme Court's obscenity jurisprudence is

¹⁵⁰ See par 3 3 4 (*supra*). See also par 3 4 4 (*infra*).

¹⁵¹ In *Jacobellis v The State of Ohio* at 197 (*supra*). See the opening quotations at the beginning of this chapter for a full version of Stewart J's infamous remarks.

¹⁵² Ronald Dworkin rightly observes that "[l]iberals defending a right to pornography find themselves triply on the defensive: their view is politically weak, deeply offensive to many women, and intellectually doubtful": see "Women and Pornography" *The New York Review* October 21, 1993. Brennan J's change of course in *Paris Adult Theatre I v Slaton* (*supra*) could possibly be seen as an attempt to reconcile his new view (namely that the United States Constitution prohibits government from suppressing obscenity except in the case of unconsenting adults and minors) with the instrumental justification of free speech. Had Brennan more clearly recognised the constitutive justification of free speech when the Supreme Court was first called upon to consider the issue, he would undoubtedly have been in a much stronger position to formulate a persuasive constitutional argument against hard core pornography. See also par 3 3 4 n 80 (*supra*).

accepted, the First Amendment could be understood to protect nothing but political speech. The protection that the Supreme Court affords to literature, art and science¹⁵³ under the rubric of the First Amendment can accordingly only be accounted for as a derivative from that principal political function. The Supreme Court's reliance on the instrumental justification in its obscenity jurisprudence therefore leads to (and reinforces) only one assumption, namely that the principal task of the First Amendment is the protection of political speech in order to assist citizens to effective participation in the political process and the exercise of their fundamental political rights as citizens.

Yet the instrumental justification of freedom of expression on its own cannot provide an intellectually acceptable justification for the First Amendment to the United States Constitution, even for its political crux. The liberal argument that free speech is necessary if citizens are to be in charge of their own political structures could, for example, explain why a democratically elected government must not be allowed to resort to the covert censorship of sexually explicit material which citizens would reject if they were aware of its existence. But this does not explain why the majority of citizens should not be allowed to impose restrictions on pornographic material that they both approve of and indeed desire. If the Supreme Court can distinguish between political and, for example, commercial speech (which it has firmly established enjoys much weaker constitutional protection)¹⁵⁴ then surely the court could also distinguish racist or sexist speech from other forms of political comment and/or expression? This would enable the Supreme Court to uphold legislative measures designed to prohibit political speech that violates the right to equality on grounds of race, sexual orientation, religion, sex, etc. The instrumental justification of free speech would clearly offer little protection against a statute designed with this political objective. The United States Supreme Court clearly finds itself in an untenable situation, since the instrumental premise of its view of obscenity actually serves to *undermine* the court's conception of a just political society.

Two critical consequences result from the Supreme Court's exclusion of obscenity from First Amendment protection. On the one hand, the Supreme Court has argued itself into a position where it can offer neither a constitutional nor philosophical basis on which to reject arguments for the regulation of *all* sexually explicit material. More particularly, the instrumental goal of

¹⁵³ See par 3 3 2 and par 3 3 6 (*supra*).

¹⁵⁴ See *Virginia Pharmacy Bd v Virginia Consumer Council* 425 US 748 (1976). Prior to 1976, United States constitutional jurisprudence viewed most kinds of commercial speech as an unprotected category situated outside the scope of the First Amendment: see *Valentine v Christensen* 316 US 52 (1942). For an exposition of the criteria employed by the Supreme Court to determine whether the regulation of commercial speech violates the First Amendment, see *Central Hudson Gas v Public Service Commission* 447 US 557 (1980).

a democratic and political order offers no resistance to the radical feminist argument that women are more effective participants in the political process when their fundamental rights and freedoms are not violated by the production and dissemination of sexually explicit material. The instrumental justification of freedom of expression employed by the Supreme Court actually underscores an argument for the regulation of pornography (albeit pornography conceptualised as a mode of speech or expression). The Supreme Court would therefore have to agree that legislative measures which conceptualise pornography as a violation of women's fundamental rights and liberties would enhance - rather than compromise - a democratic order to the degree that these measures seek to restrict speech which decrease women's voice and role in the democratic political process.¹⁵⁵ On the other hand, the United States Supreme Court can also provide no constitutional (or philosophical) justification not to endorse the markedly different approach adopted in 1992 by the Supreme Court of Canada on the issue of obscenity.¹⁵⁶ By employing an instrumental argument, the Canadian Supreme Court upheld a provision of the Canadian Criminal Code¹⁵⁷ which prohibits certain categories of pornographic material. Although the Supreme Court conceded that the effect of its decision was to narrow the scope of the right to freedom of expression guaranteed in section 2(b) of the Canadian Charter of Rights and Freedoms,¹⁵⁸ it maintained the view that sexually explicit material acutely offend the values fundamental to Canadian society. The Supreme Court thus found the restrictive effect of the Criminal Code on free expression justified given the gravity of the harm and the threat to the social and constitutional values at stake.

The United States Supreme Court accordingly finds itself in a precarious position and needs to recognise that it can only provide sound justification for the protection of "non-obscene pornography" under the rubric of freedom of expression (and thus rebut radical feminist arguments) if it incorporates both the instrumental and constitutive aspects of justification into its conception of obscenity. Apart from the serious intellectual and philosophical obstacles presented by the court's approach, its failure to address specific feminist concerns about

¹⁵⁵ Easterbrook J's rejection of this radical feminist strategy in *American Booksellers Association v Hudnut* 771 F2d 323 7th Cir (1985) indeed shows that he parted ways with the Supreme Court's justification of free speech and tacitly relied on the constitutive rather than instrumental justification for freedom of expression. For a discussion of the decision of the Seventh Circuit Court of Appeals, see par 3 5 1 3 - par 3 5 1 4 and accompanying footnotes (*infra*).

¹⁵⁶ In *Regina v Butler* [1992] 1 SCR 452. A comprehensive discussion of the Supreme Court's decision, its possible implications and value to South African law follow in Chapter 4 of this dissertation (*infra*).

¹⁵⁷ Section 163(8) of the Criminal Code RSC C-46 of 1985.

¹⁵⁸ Constitution Act of 1982 Part I (*supra*).

pornography also serves to weaken its stance and undermine its credibility on the issue. I shall now proceed with the second part of my critical assessment of the Supreme Court's obscenity jurisprudence in which I shall consider the liberal conception of harm coupled with the court's test set out in *Miller v California*.

3 4 4 The Supreme Court's Conception of Harm and the Standard of Obscenity in *Miller v California*

The liberal paradigm which the Supreme Court of the United States employs in its test for obscenity has led the court to embrace a restrictive conception of harm and injury. In its First Amendment jurisprudence, the Supreme Court requires a direct causal link between speech and the alleged harm caused. The extent to which the court is prepared to tolerate overtly racist and anti-Semitic speech or utterances is telling of its understanding of harm. In the well known case of *Brandenburg v The State of Ohio*,¹⁵⁹ the Supreme Court upheld the First Amendment right of the Ku Klux Klan to publicly call for the expulsion of blacks and Jews from American society. Phrases that were used by the Ku Klux Klan included "there might have to be some revenge taken", "[Jews should be] returned to Israel" and a public call to "[b]ury the niggers."¹⁶⁰ In determining the extent to which the state is permitted to forbid utterances of this nature, the Supreme Court held that the state may not proscribe advocacy of the use of force of a violation of law except where such advocacy "is directed to inciting or producing *imminent* lawless action and is likely to *incite or produce* such action."¹⁶¹ Subsequent to this decision, the court has also rejected the notion that imminent and likely harm can be shown by linking a class of harm with a class of speech.¹⁶² Since the Supreme Court requires that particular harms be related to particular speech, its conception of injury is likely to bear adversely on measures which seek to proscribe sexually explicit material.¹⁶³ Consequently, it is settled in United States constitutional jurisprudence that speech enjoys protection under the First Amendment unless it constitutes unlawful action or is directly tied to unlawful speech such as libel, solicitation, incitement or conspiracy. The modern standard applied by the Supreme Court in respect of speech and harm thus affords greater protection to freedom of expression than at any time in the history of its First

¹⁵⁹ 395 US 444 (1969).

¹⁶⁰ At 446 (*supra*).

¹⁶¹ At 447 (*supra*). My emphasis.

¹⁶² See *Hess v The State of Indiana* 414 US 105 (1973). In this case, the Supreme Court overturned a conviction for disorderly conduct on the basis that the defendant's speech was neither directed toward a particular person nor intended to incite a specific act of violence.

¹⁶³ At 107 - 109 (*supra*).

Amendment jurisprudence. In the post-Cold War era, the American nation evidently believed to be relatively free of the dangers of foreign infiltration or destruction of democracy.¹⁶⁴ This means that the protection afforded to free speech, the press and assembly by the First Amendment does not permit the state to proscribe the advocacy of force to effect political, social or economic change or forbid assemblies designed to promote such beliefs, except where the advocacy of assembly will produce *imminent* lawless action.¹⁶⁵

Therefore, since the Supreme Court's understanding of harm demands evidence of a causal connection between speech and harm or injury, it requires a sophisticated theory of psychological causation as a prerequisite for statutory action against pornographic material that would fall outside the ambit of the court's standard of obscenity. This translates into a requirement of conclusive evidence that pornography (meaning non-hard core pornography or material not deemed obscene) causes harm to women in that it changes attitudes which translate into specific acts of violence against women. And yet United States courts are reluctant to link violent pornography to evidence of sexual abuse. Social scientific studies that purport to show a correlation between pornography and instances of sexual violence against women¹⁶⁶ are dismissed by the courts as "very difficult to interpret"¹⁶⁷ and thus inconclusive. Since pornography is assumed to constitute mere words and images, these cannot in themselves cause injury. And since it is required that harm must be direct, only pornography which directly incites the commitment of acts of imminent violence would be understood to "cause" harm, provided that actual injury occurs as a result. The libertarian idea of injury has no way, therefore, of either conceptualising or recognising harm that does not cause direct (physical) injury or which advocates hate propaganda on the basis of race, ethnicity or gender. Consequently, the Supreme Court finds it especially difficult to conceive of non-violent pornographic material which

¹⁶⁴ See Van der Westhuizen in D van Wyk et al *Rights and Constitutionalism* 264 at 280 (*supra*).

¹⁶⁵ This was expressly affirmed by the Federal District Court in respect of pornography. The court held that the forms of expression defined as pornography under the anti-pornography ordinance for Indianapolis did not "by their very nature carry the immediate potential for injury": see *American Booksellers Association Inc v Hudnut* at 1331 (*supra*).

¹⁶⁶ See, for example, Daniel Linz et al "The Effects of Multiple Exposures to Filmed Violence Against Women" 1984 34 *Journal of Communication* 130 at 142 (documenting that men exposed to filmed violence against women judged a rape victim to be less injured than did the control group); Neil M Malamuth and James VP Check "Penile Tumescence and Perceptual Responses to Rape as a Function of the Victim's Perceived Reactions" 1980 10 *Journal of Applied Social Psychology* 528 at 542 - 543 (documenting that exposure to rape depictions affected future reactions to rape). See also n 168 (*infra*).

¹⁶⁷ Per Easterbrook J in *American Booksellers Association Inc v Hudnut* n 2 (*supra*), citing *Gregg v The State of Georgia* 428 US 153 (1976) at 184 - 187.

contains degrading or dehumanising images of women as harmful. Research studies which found that material of this nature lower inhibitions, promote sexual aggression, increase the acceptance of women's sexual servitude and male dominance in intimate relationships,¹⁶⁸ appear to have no persuasive force whatsoever. The Supreme Court would not, therefore, find it reasonable to conclude - as its Canadian counterpart has done¹⁶⁹ - that material of such a nature represent an appreciable risk of *social* harm, particularly to women and thus society as a whole.

The libertarian conception of harm, coupled with the test of obscenity employed by the United States Supreme Court in *Miller v California* seems to render United States obscenity jurisprudence unlikely to accommodate either of the two feminist arguments that I intend to employ against pornography in this study.¹⁷⁰ In formulating the standard to determine whether sexually explicit material would enjoy constitutional protection or not, Burger CJ held that United States courts must launch an investigation in three parts. Courts must determine "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁷¹ I shall now proceed to evaluate each of the components of the Supreme Court's three-part standard of obscenity.

3 4 4 1 "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"

The first part of the Supreme Court's test requires an investigation into whether the *average person* would find that the work solicits prurient interest. The concept of the "average person"

¹⁶⁸ See, in particular, Check and Malamuth "Pornography and Sexual Aggression: A Social Learning Theory Analysis" 1986 9 *Communication Year Book*; Diana EH Russell "Pornography and Rape: A Causal Model" 1988 9 *Political Psychology* 41; Dolf Zillmann and Jennings Bryant "Effects of Prolonged Consumption of Pornography on Family Values" 1988 9 *Journal of Family Issues* 518; Zillmann and Bryant "Effects of Massive Exposure to Pornography" and Zillmann and James B Weaver "Pornography and Men's Sexual Callousness Toward Women" in NM Malamuth and E Donnerstein (eds) *Pornography and Sexual Aggression* (1984) 115 at 130 - 131 and 95 respectively.

¹⁶⁹ In *Regina v Butler* (*supra*). See also *Regina v Wagner* (1985) 43 CR (3d) 318 (Alta QB); *Regina v Ramsingh* (1984) 14 CCC (3d) 230; and *Towne Cinema Theatres Ltd v The Queen* [1985] 1 SCR 494.

¹⁷⁰ See par 3 1 n 10 (*supra*).

¹⁷¹ At 24 (*supra*).

is far from self-explanatory. It is, in fact, a highly charged - and thus problematic - concept. Although the court has bowed to political correctness and employs the term average *person*, the actual content of the standard remains inevitably Western, inevitably male. Additional problems arise when this standard is required in a society characterised by acute racial, ethnic and cultural diversity. In a country such as South Africa where no less than eleven official languages are recognised¹⁷² and (cultural) diversity is acknowledged and promoted by its Constitution,¹⁷³ it would seem to be an exercise in futility to seek - let alone require by law - a homogeneous standard to determine whether a work is legally obscene. Prior to the inception of a constitutional democracy, some South African writers proposed that the new legal and political dispensation should make a point of employing the terms "man and woman" or "woman and man" rather than "person" or "man" to make it undeniably clear that women are included.¹⁷⁴ But the mere use of different words would not be sufficient if the underlying standard does not change as well. Besides, the term "woman and man" still leaves cultural-specific and racial or ethnic-specific questions unanswered. It would seem that for the standard to have any meaning, a court would have to be very specific about which "average person" it seeks to employ in its enquiry into the obscene nature of a depiction or description.

The requirement that the court must apply *contemporary community standards* - although linked to the average person-enquiry - raises particular problems in itself. By applying contemporary community standards, the Supreme Court is undeniably subscribing to a subjective standard. This is in fact revealed by the court's acknowledgement that there are likely to be as many definitions of obscenity as there are federal member states.¹⁷⁵ I find the community standard-requirement problematic for two reasons. First, for it to have any real meaning (and thus be

¹⁷² Section 6 of the Constitution of the Republic of South Africa, Act 108 of 1996 (*supra*), recognises Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu as official languages of the Republic.

¹⁷³ See the Preamble to Act 108 of 1996 (*supra*). See also section 6(5) which provides for the establishment of a Pan South African Language Board to promote (and create conditions for) the development and use of all official languages (namely the Khoi, Nama and San languages as well as sign language) and all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil and Urdu as well as other languages used for religious purposes, including Arabic, Hebrew and Sanskrit; section 30 which entrenches the right of everyone to use the language and to participate in the cultural life of their choice; and section 31 of Act 108 of 1996 which protects the cultural, religious and linguistic rights of South African communities.

¹⁷⁴ See Lesbury van Zyl "What do Women want from the Law?" 1992 109 *SALJ* 509 at 514.

¹⁷⁵ At 27 (*supra*).

legally enforceable), one must proceed from the assumption that a uniform community standard exists in respect of the whole state (or even area) in question. The Supreme Court in fact confirmed *in casu* that the relevant community standard was that of the State of California.¹⁷⁶ I find it implausible, though, that one uniform standard could apply in respect of the whole of California bearing in mind the social, cultural and economic diversity of its residents. It is unlikely that a uniform standard will prevail right across a state which includes such diverse areas as the affluent Malibu or Santa Monica and the vibrant city of San Francisco with its large gay, lesbian and Asian communities. Set in a South African context the requirement of a uniform contemporary community standard would raise much the same difficulties as in the case of the average person-standard.

The final enquiry under the first part of the Supreme Court's standard of obscenity requires that the work must appeal to the *prurient interest*. Prurient interest could well be said to be the lowest common denominator of pornographic material, the assumption being that it is bound to be sexually arousing to at least someone. Any attempt to define pornography in terms of sexual arousal (even if in part only) is inadequate. Pornography cannot merely be equated with lust or arousal, for there is a range of depictions - from advertisements for Calvin Klein underwear to images contained in a gynaecological reference work - which is bound to stir *some* prurient interest. And this is the point that the Supreme Court simply does not comprehend. Furthermore, since prurience implies a moralistic standard, tastes and attitudes are allowed to determine a legal outcome and are thus effectively elevated to a constitutional standard. The basis on which a particularly conservative segment of the South African community may wish to argue against pornography is not the same - and can never be equated with - an argument against sexually explicit depictions of women on the basis that these violate the fundamental constitutional rights and freedoms of women as a class.¹⁷⁷ Tastes and attitudes - whether conservative or progressive - must never be allowed to constitute a constitutional standard whereby sexually explicit material is judged. As long as moralistic sentiments prevail in legal reasoning, women who exercise their reproductive rights will face moral condemnation, gays and lesbians will encounter homophobia and pornography will continue to threaten women's rights to equality, human dignity and physical integrity. Furthermore, these sentiments have succeeded in - and will continue to perpetuate - the falsehood that women take part in pornography on account of their own free will.¹⁷⁸ Unless the United States (or any other legal system characterised by a supreme constitution with a justiciable bill of rights) remove moralistic

¹⁷⁶ At 31 (*supra*).

¹⁷⁷ See also par 3 6 2 (*infra*).

¹⁷⁸ I critically assessed the (feminist) argument that women willingly participate in the production of pornography in the previous chapter: see Chapter 2 of this dissertation par 2 4 2 3 and accompanying footnotes (*supra*).

sentiments and concepts from its conception of pornography, it will effectively ensure that “no one [will] believe that the actress [in pornography] suffered pain or died” or “that there was a real sexual submission”.¹⁷⁹

3 4 4 2 “(b) whether the work depicts or describes, in a *patently offensive* way, sexual conduct specifically defined by the applicable state law”

The requirement that the material must be *patently offensive* further underscores the moralistic standard favoured by the United States Supreme Court. As yet another concept which stands in need of interpretation, “offensiveness” can easily be used to target unpopular (or even unpleasant or disagreeable) views or opinions. In a plural society, the questioning of political, cultural or religious beliefs and/or practices can easily be deemed “offensive”. Furthermore, to define hard core pornography as that which is patently offensive misconstrues its harm. The Supreme Court seems to consider the obscene as deviant and anti-social. Therefore, if obscenity or hard core pornography causes harm, this harm manifests itself in acts against the good social order. It was pointed out in Chapter 2 of this dissertation that Anglo-American legal and political thinking has been dominated by liberalism¹⁸⁰ with the result that the protection of the good social order has always stood at the centre of Anglo-American conceptions of pornography. In the present instance, the Supreme Court saw the protection of unwilling recipients (on whom sexually explicit material is thrust) and minors as its primary constitutional task. The only sectors worthy of constitutional protection in the liberal state therefore appear to be minors and those whose moral sensibilities are likely to be offended. The possible effect of pornographic depictions of women on the female sector of the community is completely overlooked and so too is the nature of the social order within which women find themselves. Sexism and male supremacy appear not to exist at all and sexually explicit images of women can apparently only ever be construed as a social problem for the morally sensitive and minor children. A strategy which takes prurient interest or that which is patently offensive as constitutional objective is bound to be unsuccessful, for such a strategy endeavours to elevate tastes and attitudes to an objective judicial standard.

The reference to *sexual conduct* in the second part of the Supreme Court’s standard of obscenity seems to be a thinly veiled attempt by the court to leave it up to individual states to design concrete measures on the basis of the court’s moralistic and open-ended formulation. The Supreme Court’s own “plain examples” of what a state statute could define for regulation under this part of the court’s obscenity standard includes: “patently offensive representations or

¹⁷⁹ Per Easterbrook J in *American Booksellers Association Inc v Hudnut* at 328 (*supra*).

¹⁸⁰ See Chapter 2 of this dissertation par 2 3 1 and accompanying footnotes (*supra*).

depictions of ultimate sexual acts, normal or perverted, actual or simulated” and “patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals”.¹⁸¹ Again, the court relies on *patently offensive* to construe that which would fall foul of the First Amendment to the United States Constitution. Although I am unsure how to interpret “ultimate sexual acts”, it does seem clear that these acts, together with depictions of masturbation, excretory functions or a lewd exhibition of genitals must be deemed patently offensive *before* states will be legally entitled to proscribe depictions or representations of this nature. Moralistic sentiments are again instrumental in determining whether pornographic material will enjoy constitutional protection with the result that subjective tastes and attitudes are elevated to serve as an objective constitutional standard.

3 4 4 3 “(c) whether the work, taken as a whole, lacks *serious* literary, artistic, political, or scientific value”

The requirement that the work must lack *serious* literary, artistic or scientific value necessitates an enquiry into its precise (legal) meaning. Must “serious” be construed to mean *bona fide*? If this be the case, publications which combine graphic sexual explicitness with lifestyle articles on, for example, decor, leisure and cuisine raise obvious difficulties. Since these articles have *some* “redeeming social importance”,¹⁸² the publication is unlikely - when “taken as a whole”¹⁸³ - to fall foul of the Supreme Court’s obscenity standard. In the United States, *Playboy* and *Hustler* magazines are not deemed legally obscene for precisely this reason. By cleverly combining articles that could be construed to have some social value with graphic sexually explicit depictions of women’s bodies (or parts thereof), these two publications have managed to bask in - and indeed flourish under - the protection of the First Amendment.

I view the third part of the Supreme Court’s standard - more so than the first two - as the unmistakable result of the court’s artificial categorisation of sex versus obscenity. Realising that its obscenity standard would implicate works which have political, scientific or artistic value, it concluded that obscene portrayals of sex would not enjoy constitutional protection. The difficulties created by this rather artificial conceptualisation of hard core pornography in this part of the court’s standard are accentuated by the following example. The President of the United States of America is caught on closed circuit video enjoying fellatio with a White House intern in the Oval Office while conducting a telephone conference with the Palestinian President and the Prime Minister of Israel over the redistribution of land in Israeli occupied territories. This

¹⁸¹ At 25 (*supra*).

¹⁸² Per Brennan J in *Roth v United States* at 485 (*supra*).

¹⁸³ Per Burger CJ in *Miller v California* at 24 (*supra*).

graphic image is captured and somehow lands on the desk of the editor of a politically neutral newspaper who elects to print it. In light of its graphic, sexually explicit nature, what legal, or more specifically, constitutional ramifications are likely to result from the depiction? Would the captured image fall foul of the Supreme Court's standard of obscenity? In other words, would the average person, applying contemporary community standards, find that it appeals to the prurient interest? The Supreme Court would probably have little difficulty in finding that the captured image depicts, in a patently offensive way, sexual conduct in that it is an "actual representation" of an "ultimate sexual act" or even possibly a "lewd exhibition of genitals". It would, however, be slightly more challenging, I think, to determine whether the depiction satisfies the third part of the court's obscenity standard, for it must lack serious political or other (social) value. Since the Supreme Court requires that the work must be evaluated as a whole, context becomes a determining factor. If the image of the President engaged in an "ultimate sexual act" appeared in the election manifest of the Republican Party, the depiction may well be found to be of *some* political importance or value. A President engaging in sex in the Oval Office while simultaneously attending to matters of state raise serious questions about whether he is fit to serve in such a high political office. Seen in this context, the depiction could then be said to have serious political value indeed. Let us assume that the image also appeared nationwide in an edition of *Hustler* magazine. The different context highlights the problems inherent in applying contemporary community standards to determine the obscene nature of a publication. Whereas, for argument sake, in Ohio the "average person applying contemporary community standards" may find no fault with the depiction, it is likely to be judged highly undesirable in the President's home state, particularly if the publication appeared on newsstands in the run up to the American presidential election.

The final dilemma that I wish to highlight about the third part of the Supreme Court's standard relates to the inevitable comparison that it invites between hard core pornography and literature or art. A comparison of pornography with art or literature suggests that good art and literature are more deserving of constitutional protection than bad art and literature, for the latter would presumably lack social value. An enquiry of this nature has little judicial value first, because the degree of badness is relative and the enquiry thus again boils down to a matter of taste. Since bad literature (and bad art for that matter) is protected by the First Amendment why does the "poor-quality stuff"¹⁸⁴ known as obscenity not enjoy similar protection? The case made by the United States Supreme Court for the restriction of obscenity on this basis is less than convincing. It amounts to no more than a moralistic-cum-paternalistic repression which is in reality extremely difficult to reconcile with the liberal tenets of individuality, autonomy and neutrality which sustains its First Amendment jurisprudence.

184

This term is employed by Elizabeth Wolgast; see "Pornography and the Tyranny of the Majority" in P Smith (ed) *Feminist Jurisprudence* (1993) 431 at 434.

Given the numerous difficulties presented by the Supreme Court's obscenity standard, it is to be expected that United States courts find it challenging to give practical effect to its guidelines. A situation now exists that while pornographic material has become increasingly more sexually explicit and publicly available, the number of federal states which prosecute obscenity cases has in fact declined.¹⁸⁵ Obscenity laws seem to have only a minimal effect on the day-to-day regulation of hard core pornography and the conduct of the producers of such material in the United States. Some analysts attribute this to the subjective nature of the Supreme Court's test, coupled with the standard of proof required in criminal proceedings.¹⁸⁶ Since the obscenity standard requires considerable discretion from prosecutors and juries in a given context, it often becomes impossible to discharge the onus of proof required in criminal obscenity proceedings. The Supreme Court's test thus imposes a formidable obstacle to obscenity prosecutions and this is in fact reinforced by the reluctance of United States courts to review the lower federal court cases that have struck down the radical feminist anti-pornography ordinance for Indianapolis as a violation of the First Amendment.¹⁸⁷

3 4 5 To Summarise

I argued in the first part of this chapter that the standard established by the United States Supreme Court by which it proscribes sexually explicit material is unsatisfactory in a number of related aspects which renders it inadequate to accommodate either of the two constitutional arguments against pornography that I intend to explore further in this dissertation. The theoretical paradigm which the court employs to examine the issue rests on false assumptions about the social and political context within which a discourse of this nature unfolds and the degree of autonomy enjoyed by men and women in a social design characterised by systemic gender inequality.¹⁸⁸ Moreover, it was argued that the very basis on which the court justifies its conception of obscenity is flawed both philosophically and intellectually.¹⁸⁹

¹⁸⁵ Although this may not be of much significance in the context of literary or artistic discussion, a wide-ranging discretion could bear serious consequences in relation to policy-making: see Gordon Hawkins and Franklin Zimring "On Definitions" in *Pornography in a Free Society* (1988) 20 at 21.

¹⁸⁶ See, in particular, Harold Leventhal "An Empirical Inquiry into the Effects of *Miller v California* on the Control of Obscenity" 1977 52 (4-6) *New York University Law Review* 810 and Schauer in J Duncan (ed) *Between Speech and Silence* 64 (*supra*).

¹⁸⁷ See par 3 5 1 2 - par 3 5 1 3 and accompanying footnotes (*infra*).

¹⁸⁸ See par 3 4 and accompanying footnotes (*supra*).

¹⁸⁹ See par 3 4 2 - par 3 4 3 and accompanying footnotes (*supra*).

It seems virtually impossible to move obscenity law away from its historical concern with prurience and offensiveness. Since sexual explicitness *per se* is the focal point, it becomes extremely difficult to reconceptualise the issue towards sexual objectification and sexualised violence against women. The reality of violent sexually explicit material is conspicuously absent from the court's conception of the matter. The attempts by Cass Sunstein and Donald Downs (which will be assessed below)¹⁹⁰ to address "feminist concerns"¹⁹¹ about pornography in fact constitute an acknowledgement of the failure of the Supreme Court to give due consideration to this pressing concern. It really is telling of the court's approach that although women's naked bodies feature prominently in adult heterosexual pornography, the court has never so much as attempted to understand pornography from the perspective of women. To my mind, the line of questioning required by the Supreme Court as a means to determine the obscene nature of a publication leads the court to overlook the imbalance of power which exists in gender relations. This is strikingly illustrated by the example which I used above about the President and the White House intern to highlight some of the difficulties encountered under the third part of the Supreme Court's standard. Instead of seeking to determine whether the average person would find that the work appeals to prurient interest and whether it is patently offensive and thus lacks serious value, the power relations in the depiction should become the focal point. The reason why the depiction could be seen as constitutionally problematic will only be revealed once the law seeks to understand the function and role of women in adult heterosexual pornography. The depiction in question is not undesirable because it affronts our sensibilities, but because it takes place in the context of an unequal relationship of power instead. It need not be argued that presidents stand in positions of power and that this is even more so when the president in question is arguably the most powerful political leader in the world. Moreover, when the president is a man and the intern a woman, the unequal power relation becomes acute. A (male) president who expects sexual favours from a (female) employee does not engage with her as an equal but abuses his power. By employing a different paradigm, it is revealed that a woman positioned on her knees in the Oval Office performing fellatio does not - and can never hope to - act as an equal. Unless First Amendment obscenity jurisprudence understands that women occupy a central position in pornography and that gender relations are premised upon power it will be futile to proscribe sexually explicit material on the basis of prurience and offensiveness. Since moralistic sentiments perpetuate both a socially and politically problematic way of conceptualising adult heterosexual pornography, I shall now proceed to consider the radical feminist understanding of pornography as an alternative to United States First Amendment obscenity jurisprudence.

¹⁹⁰ See par 3 6, especially par 3 6 1 - par 3 6 2 (*infra*).

¹⁹¹ Downs "Pornography and Harm" in *The New Politics of Pornography* (1989) 144 at 195 (hereinafter referred to as *New Politics*).

3.5 RADICAL FEMINIST INITIATIVES IN RESPONSE TO THE CONCEPT OF PORNOGRAPHY EMPLOYED BY THE UNITED STATES SUPREME COURT

The late 1970s saw a marked increase in sexually explicit material in the United States which contained graphic depictions of rape, sexual abuse, torture and violence. These depictions of sexual violence with a misogynist content constituted a drastic change from the depictions of mere nudity in the 1960s.¹⁹² Research conducted by the United States Department of Justice during this period brought to light that the decade in which the Supreme Court handed down its decision in *Miller v California* saw a steady increase in sexually explicit material.¹⁹³ The Final Report of the Attorney General's Commission on Pornography in 1986 indicated that the most prevalent genres of pornography since the latter half of the previous decade featured actual or threatened violence of a sexually explicit nature.¹⁹⁴ The Commission grouped these types of sexually explicit material into three distinct categories.¹⁹⁵ The first identified category of pornographic material incorporated sado-masochistic themes with whips, chains and other devices of torture that are standard to this genre. The second popular genre of pornography had the central recurrent theme of rape and in almost all of this material (whether in print, picture or film) the woman eventually becomes aroused and experiences an orgasm about the (initially) forced sexual activity with the result that she is subsequently portrayed begging for more. The final identified category portrayed sexual activity or sexually suggestive nudity coupled with

¹⁹² In 1978, for example, one issue of *Hustler* magazine introduced "Chester the Molester" and his techniques of molestation: lying, kidnapping, assault and rape. Another issue of *Hustler* (also published in 1978) contained a feature entitled "About Face" which showed a man sticking a gun in a woman's mouth and forcing her to suck it while she appeared to enjoy the procedure. In the same year an issue of *Brutal Trio* depicted the kidnapping of three generations of women (a grandmother, mother and daughter) who were all beaten up, kicked around and raped after they had passed out. In *Bondage* magazine (also published in 1978) women were portrayed taking pleasure in being tied up while their breasts and vaginas were surrounded by instruments such as scissors, razors, torches and hot irons.

¹⁹³ This research culminated in the *United States Department of Justice, Attorney General's Commission on Pornography: Final Report* July 1986 (hereinafter referred to as *Attorney General's Final Report*). The Commission found that "[t]here can be little doubt that there has within the last ten to twenty years been a dramatic increase in the size of the industry producing the kinds of sexually explicit materials that would generally be conceded to be pornographic": see *Attorney General's Final Report* par 521 at 284.

¹⁹⁴ See *Attorney General's Final Report* par 521 (*supra*).

¹⁹⁵ See *Attorney General's Final Report* par 521 (*supra*).

extreme violence such as disfigurement or murder.¹⁹⁶

In 1983, the City Council of Minneapolis embarked on a project to restructure a zoning ordinance which prohibited adult bookstores, theatres and massage parlours from operating within a certain distance from residential districts, churches or educational buildings in Minneapolis.¹⁹⁷ This paved the way for Andrea Dworkin and Catharine MacKinnon to become involved in - and eventually spearhead - anti-pornography campaigns in the cities of Minneapolis and Indianapolis. In the paragraphs that follow below,¹⁹⁸ I shall discuss the circumstances which led to Dworkin and MacKinnon's involvement, their initiatives to facilitate legal and doctrinal reform and the eventual fate of their proposed anti-pornography ordinances drafted for the two respective city councils.

3 5 1 A Tale of Two Cities: The Anti-Pornography Ordinances for Minneapolis and Indianapolis

3 5 1 1 The City of Minneapolis: From Zoning Restrictions to a Civil Rights Violation

In the course of preparations for a hearing before the City Council of Minneapolis to consider proposals for the restructuring of the city's zoning ordinance, Naomi Scheman (a professor in philosophy and feminist theorist at the University of Minnesota) suggested that the appointed Neighbourhood Task Force approach two radical feminists who offered a course on pornography during the Fall Term of 1983 at the School of Law, University of Minnesota. The Neighbourhood Task Force subsequently invited Catharine MacKinnon and Andrea Dworkin to a hearing scheduled for October 1983. At the hearing, Dworkin and MacKinnon proposed that the City Council and Task Force adjust their focus and thus the framework of the debate. They argued for a reconceptualisation of pornography and against the proposed restructuring of the zoning ordinance on the basis that previous attempts at zoning had been unsuccessful because these merely reinforced existing class inequalities. Dworkin articulated their sentiments as follows:

“[t]his concentration on property indicates to me that property matters and property values matter

¹⁹⁶ Graphic sexually explicit violence involving the disfigurement or murder of women constitutes a genre of pornography commonly referred to as “slasher films.”

¹⁹⁷ Minneapolis Code Title 7 section 590.410. The ordinance prohibited adult bookstores, theatres and massage parlours from operating within 500 feet from residential areas, churches and schools. Since the ordinance sought to spread these establishments out across the city of Minneapolis, it was commonly referred to as “dispersal zoning.”

¹⁹⁸ See par 3 5 1 1 - par 3 5 1 4 and accompanying footnotes (*infra*).

but that women don't and that the city councils frequently don't want real estate values to be hurt, but they ignore the fact that women are being hurt."¹⁹⁹

Since a new strategy had to be fashioned, it was suggested that a public hearing be held on pornography to investigate the possible relationship between pornography, hate literature and violence against women. It was accordingly proposed that women who had been coerced into the production of pornography as well as women on whom sex had been forced as a result of the presence of pornographic material in their homes were to be invited to testify before the hearing. Both the City Council and Task Force agreed to these suggestions on the basis that the State of Minnesota already had an ordinance that proscribed discrimination on grounds of sex²⁰⁰ and thereby also the jurisdiction to promulgate laws against forms of discrimination. The City Council subsequently enlisted Dworkin and MacKinnon as consultants to draft an amendment to Title 7 Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights. Dworkin and MacKinnon presented their draft amendment to the City Council in November 1983 as a new subsection (numbered (gg)) of section 139.20 of the Minneapolis Code of Ordinances. The amendment read:

"Section 139.20(gg) Pornography.

Pornography is a form of discrimination on the basis of sex.

- (1) Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following:
 - (i) women are presented dehumanized as sexual objects, things or commodities; or
 - (ii) women are presented as sexual objects who enjoy pain or humiliation; or
 - (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
 - (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
 - (v) women are presented in postures of sexual submission; or
 - (vi) women's body parts - including but not limited to vaginas, breasts, and buttocks - are exhibited, such that women are reduced to those parts; or
 - (vii) women are presented as whores by nature; or
 - (viii) women are presented being penetrated by objects or animals; or
 - (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.
- (2) The use of men, children, or transsexuals in the place of women in 1(I - ix) above is pornography.

¹⁹⁹ Minutes of the Minneapolis Zoning and Planning Commission of October 18, 1983. See also Downs "The Politics of the Minneapolis Ordinance" in *New Politics* 51 at 58 n 30 (*supra*).

²⁰⁰ Section 139.10 of the Minneapolis Code of Ordinances Relating to Civil Rights proscribes, *inter alia*, discrimination in employment, property rights and education as well as on grounds of race, colour, creed, religion, ancestry, national origin, sex, disability, age and marital status.

for purposes of subsections (l) - (p) of this statute.²⁰¹

Before I proceed to discuss the eventual fate of Dworkin and MacKinnon's proposed civil rights ordinance for Minneapolis, it might be useful to first consider the different components of their legal definition of pornography in more detail.

3 5 1 2 The Dynamics of the Civil Rights Ordinance for Minneapolis

Dworkin and MacKinnon's conception of pornography places it in the context of the unequal power relation between the sexes. They accordingly define pornography as a practice of sex discrimination which sexualises the subordination of women and eroticises violence against women. Unlike obscenity jurisprudence, the definition draws no distinction between sex and pornography with the result that material cannot be targeted by the ordinance simply because of its sexually explicit nature. Sexual explicitness is but one of four characteristics attributed to pornography. In order to fall foul of the amendment, material would have to be simultaneously graphic and sexually explicit, subordinate women,²⁰² include one or more of the specific listed characteristics which describe the content of pornography and be shown to have caused harm to someone.²⁰³ The definition therefore contains five key elements.

Since Dworkin and MacKinnon link pornography to subordination, harm is conceptualised in relation to sexual objectification and/or sexual violence. Many of the items listed under the specified characteristics of pornography refer to violence. Included are presentations of women enjoying pain²⁰⁴ and experiencing sexual pleasure in being raped,²⁰⁵ women tied up, cut up, mutilated, bruised or physically hurt,²⁰⁶ women presented being penetrated by objects or

²⁰¹ Subsections (l) - (p) were added under section 4 of the ordinance and dealt with discrimination by trafficking in pornography, coercion into pornographic performances, forcing pornography on a person, assault or physical attack due to pornography and defences which cannot be raised under subsections (l) - (o). Subsection (l) - the contentious trafficking provision - conceived the production, sale, exhibition or distribution of pornography as discrimination against women by means of trafficking in pornography. For the full text of section 139.20 (1), see n 219 (*infra*).

²⁰² See par 3 5 1 2 1 (*infra*).

²⁰³ See par 3 5 1 2 3 (*infra*).

²⁰⁴ Section 139.20 (gg) (1)(ii) (*supra*).

²⁰⁵ Section 139.20 (gg) (1)(iii) (*supra*).

²⁰⁶ Section 139.20 (gg) (1)(iv) (*supra*).

animals²⁰⁷ and scenarios presenting women injured, tortured, shown bleeding, bruised or hurt in a context that makes these conditions sexual.²⁰⁸ Other items listed under the specified features of pornography refer to acts of sexual submission,²⁰⁹ degradation,²¹⁰ humiliation²¹¹ and objectification.²¹² The ordinance for Minneapolis thus includes all sexually explicit material that objectifies and/or is violent and can be proven to subordinate women in their production or use.²¹³ Since Dworkin and MacKinnon construe subordination as a central element of their definition of pornography, I shall now proceed to consider this component of the Minneapolis Ordinance more closely.

3 5 1 2 1 Pornography as Subordination

Dworkin and MacKinnon based their definition on a content-analysis of the material produced by the pornography industry. The ordinance thus set out to describe the content of pornography. Since the authors did not understand pornography to be synonymous with sexual arousal, it is a distinguishing feature of the ordinance is that it combines subordination and sexual explicitness. According to Dworkin and MacKinnon, "to accomplish its end, [pornography] must show sex and subordinate a woman at the same time."²¹⁴ They elaborate:

"[f]rom the evidence of the material itself, its common denominator is the use or abuse of a woman in an expressly sexual way. Under the Ordinance, pornography *is* what pornography *does*. What it does is subordinate women through sexually explicit pictures and words."²¹⁵

Their understanding of pornography shows due recognition that just as there exist sexual explicit

²⁰⁷ Section 139.20 (gg) (1)(viii) (*supra*).

²⁰⁸ Section 139.20 (gg) (1)(ix) (*supra*).

²⁰⁹ Section 139.20 (gg) (1)(v) (*supra*).

²¹⁰ Section 139.20 (gg) (1)(vi), (vii), (viii) and (ix) (*supra*).

²¹¹ Section 139.20 (gg) (1)(ii), (v), (vi) and (vii) (*supra*).

²¹² Section 139.20 (gg) (1)(i) - (vii) (*supra*).

²¹³ The ordinance for Indianapolis did not contain a subsection similar to subsection (1)(I) of the Minneapolis Ordinance. The ordinance for Indianapolis was thus restricted in scope to only target violent and degrading pornography. See par 3 5 1 4 n 240 (*infra*).

²¹⁴ In A Dworkin and CA MacKinnon (eds) *Pornography and Civil Rights: A New Day for Women's Equality* (1988) at 38 (hereinafter referred to as *Pornography and Civil Rights*).

²¹⁵ In A Dworkin and CA MacKinnon (eds) *Pornography and Civil Rights* at 38 (*supra*).

depictions which are not pornographic, material also exists which - although they subordinate women - is not sexually explicit and therefore not pornographic. For this reason the ordinance is restricted in scope to target only those sexually explicit pictures and words that actually can be proven to subordinate women in their production or use. Since sexually explicit subordination is the key to the legal definition of pornography, subordination is conceived as an *active practice* of placing someone in an unequal position or in a position of loss of power. Subordination therefore stands at the core of every systematic social inequality. Carol Smart draws on the subordination component of Dworkin and MacKinnon's conception of pornography and argues that the pornography genre succeeds because it transforms the meaning of (male) domination into (natural) sex which renders the inequality invisible. She accordingly defines pornography as "the dominant, persuasive, and routine regime of representation which sexualizes and limits women."²¹⁶ Susan Cole too argues in similar vein. She conceives subordination as a central element of pornography and indeed argues that because pornography is active in the subordination of women, it cannot exist without the element of subordination both in itself and in the context of our larger social organization.²¹⁷

Through the element of subordination, the ordinance conceives pornography as an *active practice* - something that is *done* to women. Therefore, anyone who brought a case under the ordinance would have to prove that the challenged material indeed subordinate women in order to show that the material constitutes pornography. The civil rights ordinance for Minneapolis therefore defines pornography as a *practice of sex discrimination* in two ways. First, in itself, pornography is a *form* of subordination, hence sex discrimination and secondly, the ordinance also conceptualises pornography as *cause* of subordination, hence of sex discrimination.

3 5 1 2 2 Pornography as a Form of Sex Discrimination

The ordinance conceives pornography itself as a form of sex discrimination in that it women are treated as sex objects or are sexually objectified, subordinated, reduced to sexual (body) parts, treated as objects of sexual use and abuse or pieces of meat or objectified for male sexual desire. Sexual objectification is thus conceptualised as an act which degrades and denies women their humanity. The ordinance does not, however, primarily target the message which pornography communicates. It is that which is done to women in pornography and its social consequences which make pornography in itself a practice of sex discrimination. Susan Cole argues that pornography "instils the values of male dominance and female subordination" and sexualises

²¹⁶ "Theory into Practice: The Problem of Pornography" in *Feminism and the Power of Law* (1989) at 133 (hereinafter referred to as *Feminism*).

²¹⁷ "The Law" in *Pornography and the Sex Crisis* (1989) 61 at 64, 66 and 98 (hereinafter referred to as *The Sex Crisis*).

male power. Pornography is also understood as a practice of sex discrimination in that it is a product manufactured and distributed by an enormously lucrative and thus powerful industry. The product is produced from real women, many of whom have been coerced or injured in its manufacture. Catherine Itzin explains:

“[w]hat happens in the making [of pornography] is real. The pictures are real, and the women in the pictures are real. The act of buying and looking is real, and whatever happens as a result is real and has real discriminatory consequences on the lives of women: whether it is a feeling or a ‘fantasy’, the formulation of an attitude or belief, or whether it is a behaviour or action, or some combination of all of these. As a ‘real’ product in which women are sexually subordinated, pornography is a practice of sex discrimination.”²¹⁸

In addition, the ordinance also conceptualises pornography as a cause of sex discrimination and subordination.

3 5 1 2 3 **Pornography as a Cause of Sex Discrimination**

One of the unique features of the ordinance for Minneapolis is that it contains a provision which enables women to take legal action against the producers of pornography.²¹⁹ Subsection (1)(3) of the ordinance stipulates that “[a]ny woman has a cause of action hereunder as a woman acting against the subordination of women.” A prospective claimant who wishes to rely on the trafficking provision must, however, prove a direct connection between pornography and harm to women as a group. To this effect, the ordinance conceives three distinct categories of harm. The first category of harm includes being targeted for rape, sexual harassment, battery and forced prostitution. The second includes the harm of being seen and treated as a sexual object or thing rather than as a human being and the final category includes the harm of second-class citizenship on the basis of gender. Dworkin and MacKinnon explained the rationale for conceptualising

²¹⁸ “A Legal Definition of Pornography” in C Itzin (ed) *Pornography: Women, Violence and Civil Liberties* (1992) 435 at 440.

²¹⁹ Section 139.20 (1) contained the trafficking provision. It read:
 “(1) Discrimination by trafficking in pornography. The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography:
 (1) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography but special display presentations of pornography in said places is sex discrimination.
 (2) The formulation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.
 (3) Any woman has a cause of action hereunder as a woman acting against the subordination of women. Any man or transsexual who alleges injury by pornography in the way women are injured by it shall also have a cause of action.”

harm in this manner as follows:

“[b]y making a public spectacle and a public celebration of the worthlessness of women, by valuing women as sluts, by defining women according to their availability for sexual use, pornography makes all women’s social worthlessness into a public standard. Do you think such a thing is likely to become Chairman of the Board? Vice President of the United States? Run your university? Edit your broadcast? Would you promote one above a man? ... In creating pervasive and invisible bigotry, in addition to constituting sex discrimination in itself, pornography is utterly inconsistent with any real progress toward sex equality for women.”²²⁰

Dworkin and MacKinnon’s conception of pornography and its harm constitutes a radical departure from mainstream individual-centred and moralistic-inspired obscenity jurisprudence of the United States Supreme Court. Their understanding grew out of an awareness of the specific activities that are associated with the production of adult heterosexual pornography, notably coercion, force, assault and trafficking.²²¹ The ordinance was conceived out of the testimony of women about what they have been subjected to in the production and consumption phases of pornography. Consequently, the language employed by Dworkin and MacKinnon is decidedly gender-specific. Since the ordinance was designed to specifically target material that combines sexual explicitness with subordination, its architects were optimistic that their definition would enable United States courts to distinguish between material that is pornographic as opposed to material which is sexually explicit only. The ordinance was expressly conceived not to implicate sexually explicit material which have artistic, literary, political, scientific or even educational value. It was therefore unlikely that the ordinance would compromise the third part of the obscenity standard established by the Supreme Court which directs a court to enquire whether the work in question lacks serious literary, artistic, political or scientific value. United States courts did not, however, share Dworkin and MacKinnon’s optimism.

3 5 1 3 The Passage and Fate of the Anti-Pornography Ordinance for Minneapolis

Based on the public hearings that were held on the amendment by the Government Operations Committee in Minneapolis,²²² the full City Council passed the amendment to the Minneapolis Code of Ordinances in December 1983. However, at the first meeting of the City Council in

²²⁰ In A Dworkin and CA MacKinnon (eds) *Pornography and Civil Rights* at 48 (*supra*).

²²¹ See Cole *The Sex Crisis* 61 at 102 (*supra*).

²²² Witnesses who appeared at the public hearings on December 12 - 13, 1983 testified about the harm of pornography to women and children: see *Transcript of the Minneapolis Public Hearings on Ordinances to Add to Pornography as Discrimination against Women section 1* at 4 - 6.

January 1984, progressive liberal mayor Donald Fraser²²³ vetoed the ordinance on two grounds. He argued that it impacted on the First Amendment to the Constitution of the United States and consequently required further work to tailor it to these constitutional standards. With this in mind, Fraser created a Task Force on Pornography to study the constitutional aspects of the ordinance as well as other possible approaches for regulation. The Task Force met sixteen times and issued its recommendations in May 1984. In an attempt to reach consensus, the Task Force endorsed a modified version of the original ordinance. Since the express objective of the Task Force was to balance the prevention of the perceived harms of pornography²²⁴ with First Amendment concerns, its Final Report contained five recommendations.²²⁵ In reaction, Dworkin and MacKinnon produced their own revised version of the ordinance. Although the authors retained the trafficking provision, they made two major changes to the effect that "isolated passages" were exempted from the trafficking actions and the definition of pornography was tightened to emphasize (although not limiting it to) violent depictions. On 13 January 1984, the newly constituted City Council met to vote on Fraser's veto override. The vote against the override fell four votes short and it was decided to reintroduce the ordinance in a slightly

²²³ Fraser is a former congressman from Minneapolis who co-chaired the 1970 Fraser-McGovern Commission on Democratic Party Structural Reform and Delegate Selection. This Commission's recommendations led to procedural reforms in the Democratic Party which culminated in the nomination of George McGovern as presidential candidate in 1972. For more on the recommendations of this Commission, see Democratic National Commission *Commission on Party Structure and Delegate Selection, Mandate for Reform* (Washington DC 1970).

²²⁴ The Final Report of the Neighbourhood Task Force conceived the harms of pornography as two distinct categories. Whereas "location-related" harms dealt with the environmental and residential effect of pornography, "content-related" harms dealt with the "behaviors, communications and perceptions associated with messages conveyed by [pornographic] materials": see *Final Report, City of Minneapolis: Task Force on Pornography* of May 1, 1984 at 5 - 6.

²²⁵ First, it recommended the adoption of a public nuisance law, a new zoning law and a law requiring opaque covers for pornographic magazines on public display. Secondly, the Task Force called for a revision of the City's criminal law to incorporate the constitutional standards established by the United States Supreme Court in *Miller v California* (*supra*). Thirdly, the Task Force recommended that a revised civil rights ordinance be adopted in which the term "person" be substituted for "women" in the definition of pornography and in which the definition of "sexually explicit" be changed to conform to the Supreme Court's obscenity standard in *Miller v California* (*supra*). Fourthly, the Task Force recommended that the definition of pornography refer to the "sexually explicit subordination of persons" and that the definition be narrowed to include only graphic depictions of violence. The final recommendation of the Task Force was to the effect that the trafficking provision of the original ordinance be removed from the modified version of the ordinance.

modified from. The main changes pertained to word clarifications.

Three versions of the ordinance thus served before the Government Operations Committee, namely the original version, the recommendations of the Task Force and Dworkin and MacKinnon's own revised version. Since the Committee accepted most of the Task Force's recommendations, the revised version of the Dworkin-MacKinnon civil rights proposal was rejected. There seemed to exist general agreement among the members of the Committee that the radical feminist proposal would compel courts to act as a censor and would dilute the enforcement of other existing civil rights measures to the detriment of existing grounds.²²⁶ The City Council of Minneapolis thus passed the modified version of the ordinance. Once again Mayor Fraser exercised his veto right on the same basis as before. In July 1984, the City Council failed to override the veto. When it enacted the amended ordinance, the City Council also passed a resolution to the effect that it would re-enact the vetoed ordinance if the Federal District and/or Federal Appeals Court upheld the version of the ordinance passed by the City Council of Indianapolis which was then pending.²²⁷ Mayor Fraser did not veto this enactment.²²⁸ In the end, the City Council of Minneapolis elected to pass an obscenity ordinance update which required that pornographic magazines on display in public places be wrapped in opaque covers with the intent to protect minors and unwilling (adult) viewers.²²⁹ This statutory amendment was upheld by the United States Court of Appeals in 1985.²³⁰

3 5 1 4 The Anti-Pornography Ordinance for Indianapolis: *American Booksellers Association Inc v William Hudnut*²³¹

As was the case in Minneapolis, a public hearing was conducted in Indianapolis to draw attention to the social impact of pornography on the lives of women. This time, however, the hearing was

²²⁶ For a list of existing grounds under section 139.10 of the Minneapolis Code of Ordinances Relating to Civil Rights, see n 200 (*supra*).

²²⁷ In *American Booksellers Association Inc v Hudnut* (*supra*). See also par 3 5 1 4 (*infra*).

²²⁸ See the Minneapolis Resolution Stating Intent to Pass Civil Rights Pornography Ordinance upon Review of Indianapolis Decision of July 12, 1984.

²²⁹ See Minneapolis Ordinance Amending Title 15 Chapter 385 of Minneapolis Code of Ordinances Relating to Offenses Miscellaneous of July 2, 1984.

²³⁰ In *Upper Midwest Booksellers Association v City of Minneapolis* 780 F2d 1389 8th Cir (1985).

²³¹ 771 F2d 323 (1985); affirmed 475 US 1001; appeal denied 475 US 1132 (1986).

met with severe criticism from liberal quarters. MacKinnon was accused of employing questionable tactics to gain support for her contention that pornography causes harm to women. Donald Downs in particular took MacKinnon to task about evidence presented at this hearing to show a link between pornography and acts of sexual violence against women. In his account of the Indianapolis hearing,²³² Downs claims that the appearance of Edward Donnerstein²³³ before the City Council of Indianapolis was "a surprise move"²³⁴ by the anti-pornography lobby. Downs' view could simply be the result of having based his assessment on a document footnoted by him as "Administration Committee Notes"²³⁵ rather than on an official transcript of the public hearing. In fact, Donnerstein's appearance at the hearing had been clearly announced before by Deborah Daniels who presented evidence on behalf of the Office of the City Prosecutor.²³⁶ Downs furthermore alleges that "[a]s at Minneapolis, MacKinnon questioned Donnerstein, eliciting testimony on his research to support her legal points."²³⁷ Again Downs' account does not constitute an accurate representation of events. MacKinnon was in fact not present when Donnerstein testified in Indianapolis with the result that he responded to questions from members of the City Council. When requested to produce the source documents he relied upon, Downs indicated in a letter to MacKinnon²³⁸ that he no longer had them in his possession.²³⁹

²³² See "Strange Bedfellows: The Politics of the Ordinance in Indianapolis" in *New Politics* 95 - 143 (*supra*).

²³³ Donnerstein was a psychologist at the Centre for Communication Research at the University of Wisconsin, Madison at the time of the Minneapolis and Indianapolis hearings. He has published extensively on the correlation between pornography and sexual violence against women in partnership with Neil Malamuth from the University of California, Los Angeles. Both are regarded leading experts in this area of social scientific research. For an exposition of their work, see n 166 and n 168 (*supra*).

²³⁴ *New Politics* 95 at 123 (*supra*).

²³⁵ *New Politics* 95 at 123 n 123 (*supra*).

²³⁶ Daniels presented the testimony of a local counsellor on "Women in Pornography" who could not be present at the hearing on April 16, 1984: see MacKinnon "The Indianapolis Hearing" in MacKinnon and Dworkin (eds) *In Harms Way* 269 at 281 - 285 (*supra*).

²³⁷ *New Politics* 95 at 123 (*supra*).

²³⁸ This letter was dated June 4, 1984: see MacKinnon "The Roar on the Other Side of Silence" in CA MacKinnon and A Dworkin (eds) *In Harms Way* 3 at 9 n 24 (*supra*).

²³⁹ Downs' discussion of campaigns to pass ordinances similar to that of Minneapolis and Indianapolis in other American cities only mentions those campaigns which failed, namely Cambridge (Massachusetts), Los Angeles (California) and Madison (Wisconsin). He makes no mention at all of the fact that an anti-pornography ordinance was passed by referendum in Bellingham,

After the hearing was concluded, a revised version of the Minneapolis ordinance was passed in Indianapolis²⁴⁰ and signed into law on 23 April 1984 by Mayor William Hudnut III. Campaigns to pass similar ordinances in other American cities followed.²⁴¹ Shortly after the Indianapolis ordinance was passed, the City was sued by American Booksellers Association Inc (together with other media groups)²⁴² on the basis that the ordinance violated the First Amendment to the United

Washington where it attracted a staggering 62% of the vote. See also n 241 (*infra*).

240

Section 16-3(q)(1) - (6) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana contained the legal definition of pornography. It read:

"Section 16-3(q)

Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section."

241

These campaigns were all executed by means of public referendum. In Cambridge, Massachusetts the proposed ordinance received 42% of the vote in a referendum, compared to the 62% of the votes attracted in Bellingham, Washington. The result of the latter referendum was, however, invalidated by a Federal Court on the basis that the decision of the Federal District Court in *American Booksellers Association v Hudnut* (*supra*) was binding. Also in 1985, the Los Angeles County Board voted 3 - 2 against a version of the ordinance. In Madison, Wisconsin attempts to pass a version of the Indianapolis ordinance which underscored violence and lack of consent in sexual relations was also unsuccessful. See, in general, MacKinnon "The Roar On the Other Side of Silence" in MacKinnon and Dworkin (eds) *In Harm's Way* 3 at 4 n 4 (*supra*).

242

These, *inter alia*, included the Association of American Publishers Inc, the Council for Periodical Distributors Association, the Freedom to Read Foundation and the Koch News Company.

States Constitution. Barker J found in favour of the plaintiffs.²⁴³ After hearing oral argument, she struck down virtually all of the ordinance's provisions on the basis that these constitute a violation of the First Amendment. Since Barker J found that the categories of speech which the ordinance sought to control extended beyond the Supreme Court's conception of obscenity, she concluded that

"it becomes clear that what the defendants actually seek by enacting this legislation is a newly-defined class of constitutionally unprotected speech, labelled 'pornography' and characterized as sexually discriminatory."²⁴⁴

On appeal by the City Council, the decision of the Federal District Court was upheld by the Federal Appeals Court for the Seventh Circuit in Chicago.²⁴⁵ Thereafter, the City Council of Indianapolis appealed without success to the United States Supreme Court which affirmed the ruling of the Federal Appeals Court summarily²⁴⁶ on 24 February 1986.²⁴⁷ Although the decision of the Federal Court of Appeals for the Seventh Circuit differed very little from the judicial position established twelve years earlier by the United States Supreme Court, a number of aspects of the opinion of Easterbrook J²⁴⁸ justifies closer inspection.

The appeal by the City of Indianapolis to the Court of Appeals included substantial excerpts from

²⁴³ 598 F Supp 1316 SD Ind (1984). This was the very first case for Barker J who had just recently been appointed as Federal District Judge by President Ronald Reagan and sworn in on March 30, 1984.

²⁴⁴ At 1331 - 1332 (*supra*).

²⁴⁵ 771 F2d 323 (1985).

²⁴⁶ A summary affirmance is a device - now largely obsolete - through which the United States Supreme Court upholds an appellate result without reading the briefs on the merits of the case, hearing oral argument or expressing any views on the reasoning used in the opinion that reached that result. Yet, although summary affirmances are formal rulings on the merits of a case, it is only binding in the Circuit in which it was handed down. This could in the present instance very well have resulted in another anti-pornography ordinance being introduced and found constitutional in another Circuit, reviewed and upheld by the Supreme Court. The likelihood of a finding of constitutionality is thus improved if an ordinance is revised or if the law on the subject has changed in the interim. Therefore, since summary affirmances need not bind later Supreme Courts, nothing prevents the civil rights approach to pornography from yet being found constitutional in United States jurisprudence. All the arguments in support of its constitutionality retain their legal validity.

²⁴⁷ 475 US 1001 (1986). Burger CJ, Rehnquist J and O'Connor J dissented from the summary affirmance on the basis that they wanted to hear oral argument.

²⁴⁸ Like Barker J, Easterbrook J was a young recent Reagan appointee sometimes accused of being excessively right-wing because of his conservative interpretation and application of law.

the public hearings conducted in Minneapolis. In support of the ordinance, *amici curiae* briefs were filed by several activist groups who opposed pornography and violence against women.²⁴⁹ In support of the American Booksellers Association, two *amici curiae* briefs were filed by the American Civil Liberties Union (together with the Indiana Civil Liberties Union and the Illinois Civil Liberties Union) and the Feminist Anti-Censorship Task Force.²⁵⁰ The substantive part of Easterbrook J's decision commenced with a quote from *West Virginia State Board of Education v Barnette*²⁵¹ in which the Supreme Court articulated the principle that was to emerge as the liberal doctrine of state and content neutrality. Easterbrook J elaborated:

"[u]nder the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious - the belief of Nazi's led to the death of millions, those of the [Ku Klux] Klan to the repression of millions. A pernicious belief may prevail ... One of the things that separates our society from theirs is our *absolute right* to propagate opinions that the government finds wrong or even hateful."²⁵²

This *dictum* set the tone for his assessment of the constitutionality of the anti-pornography ordinance for Indianapolis. Easterbrook J declared that the ordinance, especially in its more ideological definitions, cuts to the heart of this doctrine by distinguishing what its authors deemed appropriate from inappropriate sexually explicit portrayals. And since the ordinance

²⁴⁹ These, *inter alia*, included Women Against Pornography, Citizens Against Pornography, the Minnesota Coalition for Battered Women, the Washington County Sexual Assault Centre and the Task Force on Prostitution and Pornography.

²⁵⁰ Nan Hunter and Sylvia Law filed this *amici curiae* brief in support of American Booksellers Association. They argued forcefully in favour of the protection of what they referred to as "sexual expression" or "sexually explicit speech" on the basis that any curtailment of these modes of speech would in fact be detrimental to women by, *inter alia*, infringing upon women's capacity to voluntarily agree to participate in the creation of sexually explicit images: see "Brief *Amici Curiae* of Feminist Anti-Censorship Task Force et al in *American Booksellers Association v Hudnut*" in P Smith (ed) *Feminist Jurisprudence* 467 at 472 (*supra*). See also Chapter 2 of this dissertation par 2 3 3 and accompanying footnotes (*supra*).

²⁵¹ 319 US 624 (1943). This decision became known as the flag salute case in which the Supreme Court articulated its views on state and content neutrality as follows at 642: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." See also, in general, John Ely "Flag Desecration: A Case Study in the Roles of Categorization and Balancing First Amendment Analysis" 1975 88 *Harvard Law Review* 1482.

²⁵² At 327 - 328 (*supra*), citing *Police Department v Mosley* 408 US 92; 92 S Ct 2286; 33 L Ed 2d 212 (1972), *Collin v Smith* 578 F2d 1197 (7th Cir); 439 US 916; 99 S Ct 291; 58 L Ed 2d 264 (1978) and *Brandenburg v The State of Ohio* (*supra*). My emphasis.

does not conform to established obscenity law either, it fails to satisfy the neutral principles which sustains United States First Amendment jurisprudence. Consequently, by virtue of the fact that the ordinance establishes an "approved view of women", it constitutes "thought control"²⁵³ and is thus unconstitutional.

When confronted by the radical feminist contention that sexually explicit material subordinates women, Easterbrook J's reasoning becomes somewhat nebulous. He clearly struggled to dismiss the notion that mere words and images cannot in themselves cause injury and are accordingly harmless. Easterbrook J in fact conceded that

"we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets."²⁵⁴

I find it perplexing, however, that although Easterbrook J was prepared to accept the hypothesis of the ordinance on the basis that people often act in accordance with the images and patterns around them, this was not sufficient to save the ordinance from constitutional impugment. Easterbrook J's justification raises even more concern. Apparently, the fact that "depictions of subordination tend to perpetuate subordination" and that the "subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets",²⁵⁵ merely demonstrate the power of pornography as a mode of speech. It would thus seem that the harm articulated by the ordinance only underscores the importance of affording pornography constitutional protection. If this is a correct assumption, Easterbrook J's argument when drawn to its logical conclusion can only be understood to mean that the more harm a particular mode of expression causes, the more constitutional protection it deserves. MacKinnon strikingly encapsulates the court's rationale:

"[t]he Court of Appeals ... expressly concedes that pornography violates women in all the ways Indianapolis found it did. The opinion never questioned that pornography is sex discrimination. Interesting enough, the Seventh Circuit ... conceded the issue of objective causation. The only problem was, the harm didn't matter as much as the materials mattered. They are valuable. So the law that prohibited the harm the materials caused was held to be content-based and impermissible discrimination on the basis of viewpoint."²⁵⁶

Since the ordinance was found to violate freedom of expression which is afforded protection by the First Amendment, it implies that pornography as defined under the ordinance constitutes

²⁵³ At 328 (*supra*).

²⁵⁴ At 328 (*supra*).

²⁵⁵ At 328 (*supra*).

²⁵⁶ See "The Sexual Politics of the First Amendment" in *Feminism Unmodified* 206 at 210 (*supra*).

constitutionally protected speech. Consequently the articulated abuse of women in pornography, the trafficking in women that constitutes the bulk of pornography, the coercion of women required to produce pornography and the abuse of women resulting from pornography²⁵⁷ all enjoy full constitutional protection. The Court of Appeals thus seems to effectively employ the freedom of speech guarantee to immunize discrimination and sexual abuse from legal remedy. Moreover, the basis on which the court found the ordinance unconstitutional, namely that it creates an approved point of view and thus fails to be content-neutral, raise particular difficulties. It was argued above²⁵⁸ that an abstract system of free speech effectively serves to maintain entrenched structural inequalities. By failing to recognise that speech is a constituent part of gender relations, the court effectively fails to understand that a content-neutral approach does not necessarily imply any particular response or sensitivity to what women say when they articulate their experience of pornography in an individual-centred male dominated legal and political social order.

3.6 RESPONDING TO THE RADICAL FEMINIST CONCEPTION OF PORNOGRAPHY: THE PROPOSALS OF SUNSTEIN AND DOWNS

The impact of the radical feminist conception of pornography on United States constitutional jurisprudence prompted several liberal scholars to revisit the definition of obscenity established by the United States Supreme Court in *Miller v California*. The most notable among these are Cass Sunstein²⁵⁹ and Donald Downs who each formulated their own definitions of pornography.²⁶⁰ Since both these proposals were the direct result of the Supreme Court's failure to address violent sexually explicit depictions, Sunstein and Downs each sought to conceive a

²⁵⁷ These conditions were highlighted by women who testified in the public hearings conducted by the city councils of Minneapolis and Indianapolis: see par 3 5 1 1 and par 3 5 1 3 (*supra*). See also "The Minneapolis Hearings" and "The Indianapolis Hearing" in CA MacKinnon and A Dworkin (eds) *In Harms Way* at 39 - 202 and 269 - 289 respectively (*supra*).

²⁵⁸ See par 3 4 and accompanying footnotes (*supra*).

²⁵⁹ Sunstein produced a trilogy of articles in response to Catharine MacKinnon's legal scholarship on pornography: see "Pornography and the First Amendment" 1986 4 *Duke Law Journal* 589 - 627, "Feminism and Legal Theory (Book Review on Catharine MacKinnon's *Feminism Unmodified: Discourses on Life and Law* 1987)" 1988 101(1) *Harvard Law Review* 826 - 848 and "Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)" 1992 92(1) *Columbia Law Review* 1 - 52.

²⁶⁰ Downs published a work on the radical feminist initiatives to formulate a legal response to pornography in 1989 entitled *The New Politics of Pornography* (Chicago: University Press).

definition of pornography that would address this failure and yet be compatible with the guarantees afforded by the First Amendment to freedom of speech and the press. In the two paragraphs that follow below, I shall first set out the respective proposals of Sunstein and Downs whereafter I shall embark on a critical assessment of them to ascertain whether their proposals constitute useful contributions to the quest for a legal definition of adult heterosexual pornography.

361 Finding a Golden Mean Between Prurience and the Constitutional Interests of Women: The Problem of Violent Pornography

Both Sunstein and Downs cast their legal arguments in a libertarian mould. Consequently, both seek to incorporate violent pornography under the rubric of existing First Amendment obscenity jurisprudence.²⁶¹ Sunstein proposes that a legal definition of pornography should be construed to target only so-called "regulable pornography."²⁶² In order to determine which categories of pornographic material could be regulated by law, Sunstein argues that the First Amendment should be interpreted to protect only high-value or high-level speech. This means that in order to qualify for constitutional protection, speech must be closely related to the central concern of the First Amendment which he conceives as the effective popular control of public affairs. Speech that concerns governmental processes (so-called "political speech") is therefore entitled to the highest level of protection, whereas speech that has little to do with public affairs may be afforded less protection. Consequently, speech that has purely "non-cognitive appeal"²⁶³ and fails to communicate a message is unlikely to enjoy full constitutional protection. Sunstein then proceeds to apply the notion of high-value speech to pornography and concludes that since sexually explicit material appeals to the "realm of passion rather than to [the] realm of intellect",²⁶⁴ it cannot be deemed high-value speech. Therefore, since pornography is neither related to the central (political) concerns of the First Amendment nor has any cognitive appeal, it can safely be categorised as "low-value speech."²⁶⁵

Sunstein's definition of pornographic material which constitute low-value speech that can be

²⁶¹ In other words, both authors formulated their response to pornography under the constitutional standard established by the United States Supreme Court in *Miller v California* (*supra*).

²⁶² See 1986 4 *Duke Law Journal* 589 at 626 (*supra*). See also, in general, "Notes on Pornography and the First Amendment" 1986 4(3) *Law & Inequality: A Journal of Theory and Practice* 28 - 38.

²⁶³ 1986 4 *Duke Law Journal* 589 at 603 n 88 (*supra*).

²⁶⁴ 1986 4 *Duke Law Journal* 589 at 603 n 87 (*supra*).

²⁶⁵ 1986 4 *Duke Law Journal* 589 at 602 - 608 (*supra*).

proscribed by law contains three elements. He proposes that "regulable pornography must (a) be sexually explicit, (b) depict women as enjoying or deserving some form of physical abuse, and (c) have the purpose and effect of producing sexual arousal."²⁶⁶ The value of this conception of pornography, he believes, lies in the fact that it draws on "feminist approaches to the problem of pornography and represent a departure from current law which is directed at 'obscenity'."²⁶⁷ The fact that pornography falls within the general class of low-value expression, coupled with the harm that physical abuse causes women, is accordingly sufficient to justify regulation.²⁶⁸

Unlike Sunstein, Downs does not believe it necessary to fashion a new class of expression that would be excluded from First Amendment protection. He is convinced that the matter can be resolved within the parameters of the Supreme Court's established standard of obscenity instead. This leads him to argue that "the *Miller* approach can be given an added gloss that addresses feminist and conservative concerns about violence" with the result that he opts to simply add a "fourth prong" to the Supreme Court's obscenity standard.²⁶⁹ He seems to favour this approach for two reasons. First, he argues that any attempt to restrict sexually explicit material must duly recognise that there exist competing viewpoints. In the interest of cultural pluralism, (contemporary) community standards must therefore be recognised when the obscene nature of sexually explicit material is scrutinised. A definition which incorporates violent sexual depictions would thus be potentially enforceable, given adequate social consensus.²⁷⁰ The second reason advanced by Downs seems to be premised upon a rather pessimistic view of censorship. He argues that the growth of the pornography industry - which he acknowledges is in part due to the under-enforcement of obscenity law - limits the prospect for the successful restriction of sexually explicit material. Since Downs understands the standard of obscenity in *Miller v California* to be concerned with the relation of pornography to "unacceptable sexual aggression and disrespect of women", he argues that "its logic can thus be seen as *reconciling* feminist and conservative viewpoints in this matter."²⁷¹ This leads Downs to conclude that the logic employed by the Supreme Court can embrace "the values of equal respect and personalization of desire" and consequently the legal doctrine established by the court "should be modified to cover only

²⁶⁶ 1986 4 *Duke Law Journal* 589 at 592 (*supra*).

²⁶⁷ 1986 4 *Duke Law Journal* 589 at 592 (*supra*).

²⁶⁸ 1986 4 *Duke Law Journal* 598 at 627 (*supra*).

²⁶⁹ See "Pornography and Harm: Toward a New Classification of Unprotected Speech?" in *New Politics* 144 at 195 (*supra*).

²⁷⁰ *New Politics* 144 at 198 (*supra*).

²⁷¹ *New Politics* 144 at 195 (*supra*). My emphasis.

violent obscenity.”²⁷² Downs therefore recommends that the Supreme Court’s existing standard of obscenity be adapted to also deal with “violent obscene depictions.” The modified test would target “portrayals of murder, dismemberment, brutality, or violence in the context of obscene acts (that is, those which depict ultimate sexual acts, lewdly displayed naked bodies, or excess of sexual detail).”²⁷³ Portrayals of this nature would then constitute ‘violent obscenity’²⁷⁴ which would not enjoy constitutional protection under the First Amendment.

3 6 2 A Critical Assessment of Sunstein and Downs’ Proposals for Legal Reform

The proposals by Sunstein and Downs are, in principle, to be welcomed. I have serious reservations however about whether their respective solutions significantly advance the debate about adult heterosexual pornography.

Sunstein’s conception of pornography as low-value speech on the basis that it does not make a useful contribution to political debate is not merely far removed from the Supreme Court’s philosophical justification of freedom of expression (which I assessed above)²⁷⁵ but is unlikely to meet the approval of United States courts as well. In fact, the Court of Appeals for the Seventh Circuit refused to entertain the notion that pornography as defined by the ordinance for Indianapolis constituted so-called “low-value” speech. Unless a definition is cast within the obscenity framework handed down by the United States Supreme Court, United States courts seem ill equipped to address the matter in a meaningful way.

To my mind, the primary shortcoming of Downs’ proposal is that he still elects to address the issue of violent pornography under the obscenity standard established in *Miller v California*. As pointed out above,²⁷⁶ Downs argues that violent depictions should not enjoy constitutional protection since these constitute a category of expression which cannot claim protection under the First Amendment. Since Downs couples violent pornography with the Supreme Court’s test for obscenity, he conceptualises violent depictions as unconstitutional because they affront our sensibilities. Sexual violence is thus a type of speech which is obscene, in other words, immoral. Consequently, Downs does not link violent pornography to any constitutional right other than freedom of expression. It thus becomes theoretically challenging to extend his argument with

²⁷² *New Politics* 144 at 195 (*supra*).

²⁷³ *New Politics* 144 at 195 (*supra*).

²⁷⁴ *New Politics* 144 at 195 (*supra*).

²⁷⁵ See par 3 4 2 - par 3 4 3 and accompanying footnotes (*supra*).

²⁷⁶ See par 3 6 1 (*supra*).

a view to link violence against women to the pressing constitutional concerns of equality, dignity and security of the person. For him the philosophical and constitutional argument against violent pornography remains premised on the notion that it constitutes an undesirable mode of expression. I already argued at length that serious theoretical, practical and political difficulties arise in respect of the First Amendment obscenity jurisprudence of United States courts. It remains difficult to see how an abstract system of free speech - to which the Supreme Court subscribes - can accommodate Downs' conception of pornography. If United States First Amendment jurisprudence has no theoretical means to accommodate hate speech,²⁷⁷ it is unlikely that the Supreme Court will construe violent pornography harmful under the rubric of the First Amendment. The libertarian concept of harm is therefore unlikely to accommodate Downs' proposal for legal reform.

I accordingly submit that Downs fails to appreciate the philosophical and intellectual basis of the paradigm within which he elects to frame his argument against pornography. Moreover, he also fails to grasp the theoretical premise of radical feminist thinking. His moralistic view of the issue causes him to lump together "feminist concerns" about pornography with those of "conservatives."²⁷⁸ He seems to think that the former will be satisfied by merely pasting an additional component to an already highly unsatisfactory (and ineffective) standard. Conservative and radical feminist arguments against pornography may show a superficial similarity, but a deeper inspection reveals that their respective arguments proceed from two distinctly different theoretical positions. Whereas conservative initiatives proceed from the basis that pornography affronts moral sensibilities, radical feminism understands pornography to be inextricably linked to our social organization. Since pornography is connected to the unequal power relation between the sexes, pornography is a matter which relates to inequality, hence discrimination. Radical feminist thinking therefore conceptualises pornography as a constitutional issue which bears on women's interests in equality, dignity and physical integrity. In contrast, it is not the primary objective of a conservative argument against pornography to secure the legal, social and political advancement of women. Joanne Fedler aptly describes a conservative anti-pornography argument as "neurotic erotophobic sex-fearing gibberish which links porn to all social evils."²⁷⁹ The difference between the radical feminist and conservative paradigms is brought into sharp relief by the issue of women's reproductive rights and campaigns for the advancement of the rights of gays and lesbians. Moral condemnation stands at the centre of a conservative response to pornography, birth control, abortion and issues affecting gays and

²⁷⁷ See par 3 4 4 and accompanying footnotes (*supra*).

²⁷⁸ *New Politics* 144 at 195 (*supra*).

²⁷⁹ See "Pyrrhic Victory over Porn" *The Sunday Times* April 21, 1996.

lesbians.²⁸⁰ Since a conservative argument has no theoretical means of recognising the intricate power relations at play, sexual violence against women is not seen as a constituent part of patriarchal relations. The interrelationship between violence and (women's) sexuality remains unexplored since sexuality is not understood as a social construct. It is not, therefore, possible to explore the extent to which female sexuality is shaped under conditions of gender inequality in a male dominated society. Neither a conservative nor libertarian analysis would therefore seem suitably equipped to conceptualise sexual violence and/or sexual objectification. Since moralistic sentiments underscore both paradigms, it becomes extremely difficult to launch a gender-specific analysis from within these two respective frameworks. As long as Sunstein and Downs elect to frame their constitutional responses within the ambit of First Amendment jurisprudence, they are, however, unlikely to address the pressing issues which radical feminists have highlighted in respect of pornography, notably the impact of male dominance on women's sexuality and indeed our entire social organization.

3 7 CONCLUDING OBSERVATIONS

I attempted to assess in this chapter whether United States law is adequately suited to accommodate the primary and alternative constitutional arguments that I intend to employ against pornography in the present study. Although the First Amendment obscenity jurisprudence of the United States Supreme Court can theoretically embrace a liberal feminist conception of pornography, it is unlikely to accept an argument against pornography on the basis that it constitutes hate propaganda.²⁸¹ I pointed out in this chapter that United States constitutional law employs a restricted concept of harm with the result that it grants constitutional protection to overtly racist and anti-Semitic speech.²⁸² It is thus unlikely that the liberal inspired First Amendment jurisprudence of the Supreme Court will accept a liberal feminist argument against pornography as hate speech on the basis that it causes harm and that the prevention of this harm justifies its prohibition. The proposal put forward by Downs is problematic for a similar reason. I have argued that it remains difficult to see how an abstract system of free speech - to which the Supreme Court subscribes - can accommodate Downs' conception of pornography. Moreover, since United States courts are of the view that the forms of expression defined as pornography under the ordinance for Indianapolis do not by their very nature carry the immediate potential for

²⁸⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) is a case in point. In this instance, the South African Constitutional Court expressly rejected a traditional moralistic (or religious-based) rationale in its assessment of whether a number of statutory and common law provisions which criminalised sodomy were inconsistent with the right to equality entrenched in section 9 of Act 108 of 1996 (*supra*).

²⁸¹ See par 3 1 n 10 (*supra*).

²⁸² See par 3 4 4 and accompanying footnotes (*supra*).

injury,²⁸³ it is unlikely that Downs' notion of pornography as "violent obscene depictions" will be favourably received by the judiciary. Sunstein's argument that only speech which is closely linked to the political concern of the First Amendment should be granted constitutional protection is - to my mind - likely to provide further sustenance to the idea that hate propaganda is deserving of constitutional protection in United States jurisprudence. Since racist or anti-Semitic propaganda is deemed political speech, it will benefit as such from the guarantees afforded by the First Amendment. Sunstein's conception of pornography is therefore unlikely to support a liberal feminist argument against pornography on the basis that it constitutes hate speech.

There exists even less reason for optimism of the likelihood that United States jurisprudence can accommodate the primary constitutional argument that I intend to explore against adult heterosexual pornography. United States courts outrightly reject the notion of pornography as a patriarchal practice that bears on women's equality, dignity and physical integrity. I argued above²⁸⁴ that the moralistic and individual-centred sentiments which United States courts employ in their treatment of pornography is philosophically far removed from a discourse which seeks both to accentuate the power imbalance which characterises gender relations and its effect on the actual social conditions of women in a legal and political order build on liberal principles. It remains difficult to see how existing United States constitutional jurisprudence will ever accept the radical feminist argument that pornography causes (social) harm to women and thus to society at large. Consequently, in the next chapter of this dissertation the constitutional jurisprudence of the Supreme Court of Canada will be examined with a view to determine whether it is better suited to provide a conceptual framework within which a legal definition of adult heterosexual pornography can be cast for South African law in support of the two feminist arguments that I intend to explore against pornography in Chapter 6 of this dissertation.

²⁸³ In *American Booksellers Association Inc v Hudnut* at 1331 (*supra*).

²⁸⁴ See par 3 4 2 and par 3 4 3 and accompanying footnotes (*supra*).

CHAPTER 4

PORNOGRAPHY AS UNDUE EXPLOITATION OF SEX OR WILFUL PROMOTION OF (GENDER) HATRED: A CRITICAL ASSESSMENT OF THE CONSTITUTIONAL JURISPRUDENCE OF THE SUPREME COURT OF CANADA

| | PAGE |
|---|------|
| 4 1 INTRODUCTION | 135 |
| 4 2 A HISTORICAL OVERVIEW OF CANADIAN OBSCENITY JURISPRUDENCE | 137 |
| 4 2 1 The Adoption of a Statutory Definition | 137 |
| 4 2 2 The Juridical Meaning of "Undue Exploitation of Sex" | 140 |
| 4 2 3 The First Statutory Attempt to Reform Obscenity Law in Canada | 148 |
| 4 2 4 Bill C-54: A Second Attempt at Statutory Reform | 152 |
| 4 3 PORNOGRAPHY, COMMUNITY TOLERANCE AND HARM DEFINED: THE JURISPRUDENCE OF THE SUPREME COURT OF CANADA | 154 |
| 4 3 1 The Facts in <i>Regina v Butler</i> | 155 |
| 4 3 2 The Decision of the Supreme Court | 156 |
| 4 3 3 The First Constitutional Question: Does Section 163 Violate Section 2(b) of the Canadian Charter? | 160 |
| 4 3 4 The Second Constitutional Question: Is Section 163 Justified Under Section 1 of the Canadian Charter? | 161 |
| 4 3 4 1 The Functions of and Foundation Test for Section 1 of the Canadian Charter | 162 |
| 4 3 4 2 Is Section 163 a Limit Prescribed by Law? | 163 |
| 4 3 4 3 Pressing and Substantial Objectives | 163 |
| 4 3 4 4 Proportionality | 166 |
| 4 3 4 4 1 Rational Connection | 168 |
| 4 3 4 4 2 Minimal Impairment | 169 |
| 4 3 4 4 3 Balancing the Effects with the Legislative Objective | 171 |
| 4 3 5 A Critical Evaluation of the Supreme Court's Conception of Pornography and Harm in <i>Regina v Butler</i> | 172 |

| | | |
|----------------|--|------------|
| 4 4 | PORNOGRAPHY AS THE WILFUL PROMOTION OF HATRED? A CRITICAL ASSESSMENT OF THE CANADIAN SUPREME COURT'S APPROACH TO HATE PROPAGANDA | 178 |
| 4 4 1 | Hate Propaganda and Freedom of Expression: <i>Regina v Keegstra</i> | 179 |
| 4 4 2 | The Facts in <i>Regina v Keegstra</i> | 180 |
| 4 4 3 | The Decision of the Supreme Court | 181 |
| 4 4 4 | The Supreme Court's Analysis under Section 2(b) of the Canadian Charter | 182 |
| 4 4 5 | The Supreme Court's Analysis under Section 1 of the Canadian Charter | 183 |
| 4 4 5 1 | Pressing and Substantial Objectives | 184 |
| 4 4 5 2 | Proportionality | 185 |
| 4 4 6 | A Critical Assessment of the Approach of the Supreme Court of Canada on Hate Propaganda in <i>Regina v Keegstra</i> | 187 |
| 4 4 7 | The Possible Value of the Canadian Approach to Hate Propaganda in respect of Adult Heterosexual Pornography and the South African Constitution | 191 |
| 4 5 | CONCLUDING OBSERVATIONS | 194 |

CHAPTER 4

PORNOGRAPHY AS UNDUE EXPLOITATION OF SEX OR WILFUL PROMOTION OF (GENDER) HATRED: A CRITICAL ASSESSMENT OF THE CONSTITUTIONAL JURISPRUDENCE OF THE SUPREME COURT OF CANADA

"They are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage. Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, on the person of a so-called sex therapist, or window washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading one is led to believe their *raison d'être* is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male."¹

"Although the Canadians considered the US experience on these issues closely in both [the *Butler* and *Keegstra*] cases, the striking absence of a US-style political speech litany suggests that taking equality seriously precludes it, or makes it look like the excuse for enforcing equality that it has become. The [*Butler*] decision did not mention the marketplace of ideas. Maybe in Canada, people talk to each other, rather than buy and sell each other as ideas."²

4 1 INTRODUCTION

This chapter is the second in a trilogy which seeks to evaluate the different conceptions of pornography in the United States, Canada and South Africa. To this end, the themes that will be addressed in this chapter are likewise intended to assist with the formulation of a legal definition of adult heterosexual pornography to support arguments against pornography within the ambit of the Bill of Rights in the South African Constitution. I have argued in the previous chapter that United States First Amendment obscenity jurisprudence is unlikely to accommodate arguments against adult heterosexual pornography which conceptualise it either as a patriarchal structure which impacts on women's fundamental rights and freedoms or as a mode of expression which incites gender hatred.³ The individual-centred moralistic approach favoured by United States courts raise particular difficulties in respect of harm, sexually explicit violence against women and hate speech. Consequently, the constitutional jurisprudence of Canada will be explored in

¹ Ferg J in *Regina v Ramsingh* (1984) 14 CCC (3d) 230 (Man QB) at 239.

² Catharine MacKinnon "Equality and Speech" in *Only Words* (1993) 71 at 102.

³ As previously indicated, the primary and alternative constitutional arguments that I intend to explore against adult heterosexual pornography in this dissertation will be cast within the ambit of these two conceptual frameworks. See, in particular, Chapter 3 of this dissertation par 3 1 n 10 (*supra*). See also, in general, Chapter 2 of this dissertation par 2 3 3 and par 2 4 3 and accompanying footnotes (*supra*).

the present chapter to ascertain whether it has the potential to transcend the particular shortcomings which I have highlighted in respect of United States obscenity law. It is anticipated that because certain similarities exist between the Canadian Charter of Fundamental Rights and Freedoms⁴ and the Bill of Rights in the South African Constitution,⁵ Canadian law may provide a valuable contribution to a discourse on pornography and women's constitutional interests in equality, dignity and physical integrity.⁶

This chapter will accordingly entail an investigation in three parts. In part one, I shall conduct a critical overview of the events which paved the way for the adoption of a statutory definition of pornography in Canada,⁷ juridical efforts to attribute meaning to this statutory definition⁸ and governmental attempts to reform Canadian obscenity law during the 1980s.⁹ The second part of this chapter will entail a critical assessment of the conception of pornography and harm which

⁴ Constitution Act of 1982 Part I (Schedule B of the Canada Act of 1982 (UK) c 11)(hereinafter also referred to as the Canadian Charter).

⁵ Act 108 of 1996 Chapter 2.

⁶ Both charters of fundamental rights, *inter alia*, contain general limitation clauses as well as extensive equality guarantees. For example, the limitation clause contained in section 1 of the Canadian Charter "guarantees the rights and freedoms set out in the Charter only to such a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." The limitation clause in section 36 of the South African Constitution has been tailored along the same lines and states that the "rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." Section 15 of the Canadian Charter contains four guarantees of equality, an open-ended list of prohibited grounds and an affirmative action provision to allow for the "amelioration of conditions of disadvantaged individuals or groups." By comparison, section 9 of the South African Constitution contains three equality guarantees, an open-ended list of prohibited grounds and allows for "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination." In addition, both charters recognize and enhance multiculturalism. To this effect, section 27 of the Canadian Charter recognises the multicultural heritage of Canadians and provides that the Charter "shall be interpreted in a manner consistent with [its] preservation and enhancement." Compare in this regard sections 30 and 31 of the South African Constitution which recognize and entrench the language, cultural, religious and linguistic diversity of South African society. See also par 4 4 and accompanying footnotes (*infra*).

⁷ See par 4 2 1 and accompanying footnotes (*infra*).

⁸ See par 4 2 2 and accompanying footnotes (*infra*).

⁹ See par 4 2 3 - par 4 2 4 and accompanying footnotes (*infra*).

the Supreme Court of Canada employed in *Regina v Butler*.¹⁰ In the final part of this chapter, I shall investigate whether the Canadian constitutional approach to hate propaganda can accommodate an argument against a particular category of pornographic material. To this end, the decision of the Canadian Supreme Court in *Regina v Keegstra*¹¹ will be examined to determine whether it can provide the conceptual framework for an analysis of pornography on the basis that it constitutes a mode of expression that promotes hatred against women.

4.2 A HISTORICAL OVERVIEW OF CANADIAN OBSCENITY JURISPRUDENCE

4.2.1 The Adoption of a Statutory Definition

Until the nineteenth century, sexually explicit material that did not constitute a challenge of the authority of the state or church could - for the most part - circulate freely in Canada.¹² The emergence of various conservative societies during the latter part of the eighteenth century did, however, lead to a gradual change in perception about the social desirability of sexually explicit material. This perceptual change corresponded with statutory efforts in England to proscribe material produced "for the single purpose of corrupting the morals of youth and of a nature calculated to stock common feelings of decency in a well-regulated mind."¹³ The meaning subsequently attributed to the provisions of the Obscene Publications Act by the Court of Queen's Bench in *Regina v Hicklin*¹⁴ prevailed for almost a century in Canadian obscenity law. The first attempt by the Canadian Parliament to proscribe obscenity under the guidance of the common law occurred in 1892 with the enactment of the Canadian Criminal Code.¹⁵ Section 179 of the Criminal Code imposed a two year imprisonment for the public sale or exhibition of printed or written material "tending to corrupt morals"¹⁶ or the public exhibition of "any

¹⁰ [1992] 1 SCR 452; 89 DLR (4th) 449. See par 4.3 and accompanying footnotes (*infra*).

¹¹ [1990] 3 SCR 697. See par 4.4 and accompanying footnotes (*infra*).

¹² See, in general, Dany Lacombe "Introduction" in *Blue Politics: Pornography and the Law* (1994) 3 (hereinafter referred to as *Blue Politics*).

¹³ *Per* Lord Campbell on the purpose of the Obscene Publications Act 20 & 21 Vic c83 of 1857: see *Hansard* (Fifth Series) House of Commons 1857 Vol 494 Column 170. See also Chapter 3 par 3.2 n 16 of this dissertation (*supra*).

¹⁴ (1868) LR 3 QB 360.

¹⁵ 2 SC C-29 of 1892.

¹⁶ See section 179(a) of the Criminal Code of 1892.

disgusting object or indecent show”¹⁷ or offers to sell, advertise or publish “any medicine, drug or article intended or represented as a means of preventing conception or causing abortion.”¹⁸ The statutory focus on the corruption of morality was in step with the long established position under common law which deemed the state to be the guardian of public morality.¹⁹ Although the successor to section 179 was repealed in 1949, the new provision of the Criminal Code still failed to provide a definition of any of its operative terms.²⁰ As a consequence, Canadian courts construed the amended provisions of the Criminal Code to correspond with the notion of obscenity embodied in the test formulated by Cockburn CJ in the *Hicklin* case.²¹ As was the case in the United States, the *Hicklin* standard (which sought to determine the effect of obscene material on the minds of particularly susceptible persons) became the object of strong criticism

¹⁷ See section 179(b) of the Criminal Code of 1892.

¹⁸ See section 179(c) of the Criminal Code of 1892.

¹⁹ See *Regina v Fringe Product Inc* (1990) 53 CCC (3d) 422 (Ont Dist Ct) at 441 - 442 *per* Charron J: “[w]hen one looks at the legislative history of the obscenity provisions of the Code, it is clear that when the English Court of Kings Bench first asserted itself in this field following the demise of the Star Chamber in 1641, it did so as the guardian of public morals.” See also *Rex v Sidley* (1663) 1 Sid 168 82 ER 1036 and *Rex v Curl* (1727) 2 Stra 788 93 ER 849 where the Court of Kings Bench accepted the argument that an obscene publication tended to corrupt the morals of the King’s subjects and as such was against the peace of King and government.

²⁰ The new section 207 of the Criminal Code read:
 “(1) Everyone is guilty of an indictable offence and liable to two years’ imprisonment who
 (a) makes, prints, publishes, distributes, circulates, or has in possession for any such purposes any obscene matter, picture, model or other thing whatsoever;
 or
 (b) prints, publishes, distributes, sells or has in possession for any such purpose, any crime comic.
 (2) Everyone is guilty of an indictable offence and liable to two years’ imprisonment who knowingly, without lawful justification or excuse
 (a) sells, exposes to public view or has in possession for any such purpose any obscene written matter, picture or other thing whatsoever;
 (b) publicly exhibits any disgusting object or any indecent show; or
 (c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a means of preventing conception or causing abortion or miscarriage or advertises or publishes an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility or curing venereal diseases or diseases of the generative organs.”

²¹ At 371 (*supra*). The Chief Justice observed: “I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. For a comprehensive discussion of *Regina v Hicklin*, see Chapter 3 of this dissertation par 321 - par 322 and accompanying footnotes (*supra*).

in Canada during the latter half of the 1950s. This dissatisfaction led to the first attempt to provide a statutory definition of obscenity in Canadian law in 1959.²² Unlike its predecessors, section 150 of the Criminal Code contained the first ever statutory definition of obscenity. The provision read:

“150(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.”²³

The first opportunity to consider the new statutory definition presented itself three years after its enactment. In *Brodie v The Queen*,²⁴ the Canadian Supreme Court lay the groundwork for the interpretation of section 150(8) and the principal tests which should govern the determination of what is obscene for the purposes of prosecution under the Criminal Code. The first step was to discard the *Hicklin* standard. In examining the definition set out in subsection (8), the Supreme Court argued that the new provision provided a clean slate and thus had the effect of rendering all the jurisprudence under the common law standard obsolete.²⁵ Judson J saw the new definition as an improvement on the common law standard, especially since “the new statutory definition does give the Court the opportunity to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury.”²⁶ Any doubt that the new statutory definition intended to provide an exhaustive test of obscenity in Canadian law was settled sixteen years later by the same court in *Dechow v The Queen*.²⁷ Laskin CJ was not only satisfied that section 150(8) prescribed an exhaustive test of obscenity in respect of a

²² See section 150 of the Criminal Code SC C-51 of 1892 as amended.

²³ Now section 163(8) of the Criminal Code RSC C-46 of 1985.

²⁴ [1962] 1 SCR 681. The majority of the Supreme Court found that DH Lawrence's novel, *Lady Chatterley's Lover*, was not obscene within the meaning of the statutory definition set out in section 150(8) of the Criminal Code. Judson J summarised his decision as follows: “[i]t has none of the characteristics that are often described in judgements dealing with obscenity - dirt for dirt's sake, the leer of the sensualist, depravity in the mind of the author with an obsession for dirt, pornography, an appeal to a prurient interest, etc.”

²⁵ Only three of the five judges in the majority opinion thought that the new statutory definition of obscenity replaced the *Hicklin* standard and even they appeared to apply it in a modified form.

²⁶ At 702 (*supra*). My emphasis.

²⁷ [1978] 1 SCR 951. In this case, the Supreme Court ascribed a wide meaning to the term “publication” and found that the sex devices in question were “publications” as the accused had made such objects “publicly known” and had produced and issued such articles for public sale.

publication which has sex as a theme or characteristic, but also expressed the opinion that the Supreme Court should apply the test in respect of other provisions of the Criminal Code as well. This meant that Canadian courts could not resort to employ the *Hicklin* standard as a back-up where an obscenity charge failed because the test prescribed by section 150(8) of the Criminal Code has not been met. Furthermore, in *Germain v The Queen*,²⁸ La Forest J (with whom the majority agreed on this point) held that the word "obscene" must be given the same meaning whether the articles are publications under section 150(1) or matter covered by section 150(2)(a)²⁹ of the Criminal Code. Once Canadian courts have reached consensus that the new provision of the Criminal Code provided an exhaustive definition of obscenity with respect to publications which exploit sex as a dominant characteristic,³⁰ the precise meaning of the words "undue exploitation of sex" presented a challenge. In an effort to give juridical meaning to section 150(8) of the Criminal Code, Canadian courts devised three tests or standards to determine under which circumstances sexually explicit material will fall foul of the provisions of the Criminal Code. I shall now proceed to discuss each of these tests in turn.

4 2 2 The Juridical Meaning of "Undue Exploitation of Sex"

A cursory reading of section 163(8) of the Criminal Code reveals that for a publication to qualify as "obscene" under Canadian law, the exploitation of sex must not only be its dominant characteristic, but such exploitation must also be "undue". In an effort to determine when the exploitation of sex will be considered undue, the Canadian Supreme Court has formulated three distinct standards. The first of these is the so-called *community standard of tolerance* test. In the first case to consider the new definition of obscenity,³¹ the Supreme Court accepted that obscenity is to be measured against "certain standards of decency which prevail in the community."³² The community standard of tolerance test has been the subject of extensive legal analysis. Some Canadian courts have held that community standards as a whole must be

²⁸ [1985] 2 SCR 241.

²⁹ Now section 163(2)(a) of the Criminal Code RSC C-46 of 1985. Section 163(2)(a) provides that "[e]veryone commits an offence who knowingly, without lawful justification or excuse, sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever."

³⁰ But compare *Regina v Cameron* [1966] 2 OR 777 where the Ontario Court of Appeal upheld a conviction of obscenity and stressed that material which tends to offend the community standard of *morality* is obscene. The court therefore still adhered to the morality rationale as was the object of the *Hicklin* standard.

³¹ In *Brodie v The Queen* (*supra*).

³² At 706 (*supra*), citing *Rex v Close* [1948] VLR 445.

considered and not the standards of a small segment of that community.³³ Other jurisdictions have argued that the standard of tolerance to be applied is a national one,³⁴ that the test must necessarily respond to changing community mores³⁵ and that expert evidence is not a fact which the Crown is obliged to prove as part of its case.³⁶ Canadian courts have not, however, applied the notion of community standards in a uniform manner. For example, in *Regina v Saint John News Co Ltd*³⁷ the Court of Queen's Bench for New Brunswick argued for a more restrictive conception of community tolerance. The Court of Queen's Bench found the material in question to be "most explicit" in that it depicted "sexual conduct, not merely nudity."³⁸ Since the court held the view that the level of tolerance was exceeded in the present instance - even though the depictions did not fall within the category of crime, horror, cruelty or violence as set out in section 159(8) of the Criminal Code - the court argued for a more restrictive test of community standards. Cases dealing with devices sold in sex shops³⁹ as well as live performances further underscore the inconsistency in the legal meaning attributed to community standards of tolerance. Some Canadian courts have argued that community standards of tolerance are defied when the

³³ Such as, for example, the university community where a film was shown or a city where a picture was exposed: see *Regina v Goldberg* [1971] 3 OR 323 (CA). See also *Regina v Kiverago* (1973) 11 CCC (2d) 463 (Ont CA).

³⁴ See *Regina v Cameron* (1966) 58 DLR (2d) 486 (Ont CA); *Regina v Duthie Books* (1966) 58 DLR (2d) 274 (BCCA) and *Regina v Ariadne Developments Ltd* (1974) 19 CCC (2d) (NSSC AD).

³⁵ See *Regina v Dominion News & Gifts Ltd* [1963] 2 CCC 103 (Man CA) *per* Freedman JA (dissenting) at 116 - 117: "[c]ommunity standards must be contemporary. Times change, and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question whether [the present materials] are obscene according to our criminal law."

³⁶ See *Regina v Sudbury News Service Ltd* (1978) 39 CCC (2d) 1 (Ont CA); *Regina v Prairie Schooner News Ltd* (1970) 75 WWR 585 (Man CA) and *Regina v Great West News Ltd* [1970] 4 CCC 307 (Man CA).

³⁷ [1982] 124 APR 91 (NBQB).

³⁸ At 100 (*supra*).

³⁹ In *Regina v Sutherland, Amitay and Bowie* (1974) 18 CCC (2d) 117 (Ont Co Ct) the court found these devices not only tolerable but indeed in the public interest. Yet three years later in *Regina v Harris* (1977) 43 APR 104 (NS Co Ct) the court argued that the same devices offend community standards.

performer is nude.⁴⁰ Other courts have found that nudity alone does not overstep the standard of tolerance,⁴¹ but that nudity combined with suggestive touching and postures would.⁴² On yet another occasion a provincial court found that a live performance involving a nude couple engaged in simulated sexual acts did not exceed community standards.⁴³ The Canadian judiciary thus struggled to provide a clear and precise interpretation of community standards of tolerance. Then in 1985, the Supreme Court was presented with an opportunity to provide clarity on the matter in *Towne Cinema Theatres Ltd v The Queen*.⁴⁴ Dickson CJ (as he then was) reviewed the existing precedents and found that

“[t]he cases all emphasise that it is a standard of tolerance, not taste, that is relevant. *What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary standard of tolerance to allow them to see it.* Since the standard is tolerance, I think the audience to which the allegedly obscene material is targeted must be relevant. The operative standards are those of the Canadian community as a whole, but since what matters is what other people may see, it is quite conceivable that the Canadian community would tolerate varying degrees of explicitness depending upon the audience and the circumstances.”⁴⁵

This *dictum* of Dickson CJ has become the definitive interpretation of community standards of tolerance in Canadian obscenity law. It is therefore settled in Canadian law that the test to determine whether a publication is legally obscene under the Criminal Code must be assessed in accordance with what Canadians would not tolerate *other* Canadians being exposed to rather than in relation to what Canadians would not tolerate being exposed to themselves. Apart from the community standards of tolerance test, Canadian courts have also developed a second standard to provide guidance with the interpretation of the Criminal Code. The so-called *degradation or dehumanization* test could be seen as the result a growing recognition in Canadian law since the early 1980s that material which could be said to exploit sex in a degrading or dehumanizing manner will not necessarily fail the community standards of tolerance test. Initiatives to investigate the distribution of sexually explicit publications and the role of

⁴⁰ See *Regina v Sidey* (1980) 52 CCC (2d) 257 (Ont CA).

⁴¹ See *Regina v Szunejko* (1981) 61 CCC (2d) 359 (Ont Prov Ct) and *Regina v Gray* (1982) 65 CCC (2d) 353 (Ont HC).

⁴² See *Regina v Campbell* (1974) 17 CCC (2d) 180 (Ont Co Ct).

⁴³ See *Regina v Kleppe* (1977) 35 CCC (2d) 168 (Ont Prov Ct).

⁴⁴ [1985] 1 SCR 494.

⁴⁵ At 508 - 509 (*supra*). My emphasis.

organized crime in their production⁴⁶ led to the launch of a programme to raise public awareness of the particular ineffectiveness of existing obscenity law to proscribe child pornography and depictions of (sexual) violence against women. The first Canadian case to respond to the challenge of violent pornography and thereby formulate the so-called degradation or dehumanization standard was *Regina v Doug Rankie Co.*⁴⁷ The court argued that contemporary community standards would only tolerate sexually explicit material that does not degrade or dehumanize one or more of the participants. Borins J explained:

"[f]ilms which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade[s] and dehumanize[s] the people upon whom they are performed, exceed the level of community tolerance ... [however], contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse ... scenes of group sex, lesbianism, fellatio, cunnilingus and oral sex."⁴⁸

Subsequent Canadian decisions, such as *Regina v Ramsingh*⁴⁹ and *Regina v Wagner*⁵⁰ went even further and held which material that degraded or dehumanized any of the participants would in fact exceed community standards even in the absence of cruelty and violence.⁵¹ In *Towne Cinema Theatres Ltd v The Queen*,⁵² Dickson CJ even considered the degradation and dehumanization test to be the principal indicator of "undueness". Although failing to specify what role the community standard of tolerance test plays in relation to degrading or dehumanizing depictions, he did observe, however, that even though Canadians might tolerate

⁴⁶ In the 1980s, the Metropolitan Police Force of Toronto joined efforts with the Ontario Provincial Police under the auspices of the Attorney General and the Solicitor General of Ontario to become the first law enforcement agency to investigate the distribution, manufacture and importation of obscene material into Canada. Although the primary function of "Project P" ("P" for pornography) was law enforcement, it also took an active role to initiative reform of Canadian obscenity law.

⁴⁷ (1983) 9 CCC (3d) 53 (Ont Co Ct).

⁴⁸ At 70 (*supra*).

⁴⁹ (1984) 14 CCC (3d) 230 (Man QB).

⁵⁰ (1985) 43 CR (3d) 318 (Alta QB).

⁵¹ The position adopted in these Canadian cases incidently correspond with the findings of the *Final Report of the United States Attorney General's Commission on Pornography* (the Meese Commission) Vol I (1986) at 938 - 1035, the *Final Report of the Metro Toronto Task Force on Public Violence Against Women and Children* (1984) at 66, the *Report of the Joint Select Committee on Video Material in Australia* (1988) at 185 - 230 and the *Report of the Ministerial Committee of Inquiry into Pornography of New Zealand* (1988) at 38 - 45.

⁵² At 505 (*supra*).

some violent forms of pornography, such material will nevertheless fall foul of the provisions of the Criminal Code. Consequently, Canadian courts will not tolerate material that is *inherently* degrading or humiliating or in which sex is linked with violence, cruelty and other forms of dehumanizing treatment even if these materials were found to be within the standard of tolerance of the community. Wilson J agreed with Dickson CJ that the line between the mere portrayal of sex and the dehumanization of people is drawn by the "undueness" concept. She saw the essential difficulty with the definition of obscenity in the Criminal Code to be related to the fact that the notion of undueness must presumably be assessed in relation to consequences which Canadian society seeks to avoid. But since so little is known about the (social) consequences of sexually explicit material, "[t]he most that can be said ... is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way. It must therefore be controlled *when it gets out of hand*, when it becomes 'undue'".⁵³

The final standard employed by Canadian courts to determine the meaning of section 163(8) of the Criminal Code is the so-called *internal necessities* test, also sometimes referred to as the *artistic defence* test.⁵⁴ In an attempt to provide further clarity of the circumstances under which the exploitation of sex will be "undue", Wilson J sought guidance in the possible artistic or literary value of the work under consideration. She articulated her thoughts as follows:

"[w]hat I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness. That the work under attack is a serious work of fiction is to me beyond question. It has none of the characteristics that are often described in judgments dealing with obscenity - dirt for dirt's sake, the leer of the sensualist, depravity in the mind of an author with an obsession for dirt, pornography, an appeal to prurient interest, etc. The section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work, as the witnesses point out and common sense indicates, must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation."⁵⁵

The Canadian Supreme Court has subsequently held that the artistic defence test is the last step in the analysis of whether the exploitation of sex is undue.⁵⁶ It follows that even material which by itself offends community standards will not, therefore, be considered undue if it is required for the serious treatment of a literary or artistic theme. For example, in *Regina v Odeon Morton*

⁵³ At 524 (*supra*). My emphasis.

⁵⁴ *Per Sopinka J in Regina v Butler* at 468 (*supra*).

⁵⁵ In *Brodie v The Queen* at 704 - 705 (*supra*).

⁵⁶ In *Regina v Butler* at 468 - 469 (*supra*).

*Theatres Ltd*⁵⁷ the Manitoba Court of Appeal argued that in order to determine whether the dominant characteristic of the film in question amounts to the undue exploitation of sex,⁵⁸ courts must have regard to various things, including the author's artistic purpose, the manner in which the author has portrayed and developed the story, the depiction and interplay of character and the creation of visual effect through "skilful camera techniques."⁵⁹ Accordingly, Canadian courts have interpreted the artistic defence test to require that a work must be considered as a whole and that sexual explicitness must have a legitimate role in advancing the plot or the theme when measured against the internal (artistic) necessities of the work itself.

My review of the efforts of the Canadian judiciary to assess the meaning of the definition of pornography contained in section 163(8) of the Criminal Code reveals that Canadian courts have failed to specify the relationship of the three tests to one another when called upon to determine to what extent sexually explicit material constitute an undue exploitation of sex. This failure could, of course, raise serious difficulties in respect of the *basis* on which sexually explicit material is to be tolerated in Canadian society. This is of particular concern with respect to the community standards test and the degrading or dehumanizing test. With both these tests being applied (apparently independently) to the same material, it becomes difficult to ascertain whether Canadians would supposedly find the material to be intolerable because it was degrading or dehumanizing, because it offended their moral sensibilities or on some altogether different basis. The uncertainty is exacerbated by the fact that Canadian courts have struggled to find common ground in respect of the precise meaning of a standard of tolerance. While the Canadian judiciary sought to meet the challenges of section 163(8) of the Criminal Code, the federal legislature meanwhile investigated proposals to bring greater clarity to the obscenity issue and thus ensure a more effective Canadian criminal justice system. In the period between 1977 to 1983, some forty bills were introduced in Parliament to tighten obscenity law by the then Minister of Justice,

⁵⁷ (1974) 16 CCC (2d) 185.

⁵⁸ The Manitoba Court of Appeals had to consider whether the film *Last Tango in Paris* was obscene and held that the issue had to be determined according to several factors. These include the testimony of experts, the classification of "restricted" which made the film unavailable to persons under eighteen years of age and the fact that the film had passed the scrutiny of the censor boards of several provinces in Canada. With due regard to all these factors, the court found the film not to be obscene within the meaning of the provisions of the Criminal Code.

⁵⁹ At 194 (*supra*).

Mark MacGuigan.⁶⁰ None of these bills were passed.⁶¹ As a consequence, pressure began to mount on government to address general dissatisfaction with obscenity law, particularly in relation to inconsistencies in the application of community standards of tolerance and the inability of law enforcement agencies to secure convictions under the Criminal Code. Public campaigns to proscribe pornography came to a head in January 1983 when the Canadian Radio, Television and Telecommunications Commission (CRTC) granted licences to private companies (so-called "pay TV channels") that broadcast programmes of a sexually explicit nature. Since these television channels were exempt from the regulation of the CRTC (which was under a legal obligation to uphold the provisions of the Broadcasting Act which banned programmes that abused a race, religion or creed) it was feared that violent and sexual explicit programmes would be broadcast into Canadian homes. These conditions prompted the federal government to appoint the Special Committee on Pornography and Prostitution in June 1983. Mindful of the fact that the Canadian legal and constitutional landscape underwent a fundamental transformation since the adoption of the Canadian Charter of Rights and Freedoms in 1982, the Committee was instructed to conduct public hearings on pornography and prostitution in Canada with a view to ascertain which social, legal and constitutional values should guide the task of policy making.⁶²

⁶⁰ See Canadian Department of Justice "General Summary of the Discussions during the National Consultation with Non-governmental Organizations on the Recommendations of the Badgley and Fraser Committee" *The Criminal Law of Canadian Society* (1985) 131 - 135.

⁶¹ All but four of the forty bills were introduced by private members of the Federal Parliament. Since it was highly unusual for Parliament to pass bills introduced by private members, all thirty-six bills failed. The four bills introduced by the federal government also failed, perhaps as a result of being part of omnibus bills addressing other pressing issues. For example, in 1978 Justice Minister Basford proposed a crackdown on pornography by altering the Criminal Code to make the production and distribution of material involving children an offence punishable by up to ten years in prison. Since this proposal was part of a larger law reform package that addressed a number of issues such as rape, prostitution, parental kidnapping, child abuse, loan sharking, alternative sentencing and matters dealing with trial procedures, child pornography was not given serious attention in this melting-pot of pressing issues. Also in 1982, Justice Minister Jean Craton proposed legislative changes to prohibit the production and distribution of child pornography at a time when Canada's rape law was perceived as a more pressing concern, with the result that the proposed changes to obscenity law were withdrawn.

⁶² Seven people were appointed by Minister of Justice MacGuigan to form the Special Committee on Pornography and Prostitution (popularly referred to as the Fraser Committee). They were Paul Fraser (partner in the Vancouver law firm Fraser and Gifford and former president of the Canadian Bar Association as well as former part-time member of the Law Reform Commission of British Columbia); Susan Clark (Dean of Human and Professional Development and Director of the Institute for the Study of Women at Mount St Vincent University in Halifax), Mary Eberts (a civil litigation lawyer, member of the Toronto law firm Tory, Tory, DesLauriers and Binnington, co-editor of

The Special Committee presented its findings to the Department of Justice in two volumes in February 1985.⁶³ Its Final Report proposed a three-tier definition of pornography in which the degree of sexual explicitness coupled with violence (or other conduct which threatened or undermined any values that are fundamental to the Canadian legal and constitutional order) served as an indicator of whether criminal sanction was justified. The Special Committee recommended the complete prohibition of two categories of sexually explicit material. The first category included sexually explicit material produced in such a way that physical harm was caused to any participant,⁶⁴ as well as material that involved the participation of children (defined as people under eighteen years of age) in sexually explicit conduct.⁶⁵ The second prohibited category included violent and degrading sexually explicit material.⁶⁶ The Special Committee did not propose that sexually explicit material that is neither violent nor degrading be subject to criminal sanction except if displayed without proper warning or if made accessible to people under the age of eighteen. The Special Committee saw the Criminal Code as the appropriate vehicle to address the question of pornography within the larger constitutional framework of the Canadian Charter. In light of the specific protection afforded to cultural diversity and gender equality by the Canadian Charter,⁶⁷ the Special Committee understood the limitation of individual rights in terms of the legal protection and advancement of historically disadvantaged groups as

Equality Rights Under the Charter of Rights and Freedoms and member of the Canadian Civil Liberties Association and the Metro Toronto Action Committee on Public Violence Against Women and Children); Jean-Paul Gilbert (senior member of the National Parole Board Quebec region, director of the Montreal Police Department from 1964 - 1969 and president of the Quebec Society of Criminology), John McLaren (Professor of Law at the University of Calgary and former Dean of Law at the University of Windsor); Andrée Ruffo (judge of the Supreme Court of Montreal) and Joan Wallace (founding president of the Vancouver Status of Women, member of the Canadian Advisory Council on the Status of Women and former director of the Canadian Research Institute for the Advancement of Women).

⁶³ See Department of Justice *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (1985) Vol I and II (Ottawa: Ministry of Supply and Services)(hereinafter referred to as *Special Committee on Pornography*).

⁶⁴ See "Recommendation Seven: Pornography Causing Physical Harm" *Special Committee on Pornography* (*supra*).

⁶⁵ See "Recommendation Five: Pornography Involving Children" *Special Committee on Pornography* (*supra*).

⁶⁶ See "Recommendation Seven: Sexually Violent and Degrading Pornography" *Special Committee on Pornography* (*supra*).

⁶⁷ See, in particular sections 15, 27 and 28 of the Constitution Act of 1982 Part I (*supra*). See also par 4 1 n 6 (*supra*) and par 4 4 and accompanying footnotes (*infra*).

part of "the sort of society we consider generations of Canadians have been striving to achieve."⁶⁸ Thus, rather than proposing a limitation of individual liberty with a view to protect the moral fibre of society - a notion that would have been at odds with the variety of lifestyles that characterise Canadian society - the Special Committee purported to employ criminal law as a tool to bolster the values that are fundamental to the Canadian legal and constitutional order and to strike a balance between the protection of individual and group rights as a matter of policy.⁶⁹

The Special Committee had scarcely begun its unenviable task of assimilating the views of the Canadian public on pornography when general elections brought a new Progressive Conservative government to power in the summer of 1984. Little more than a year after the Special Committee presented its Final Report to the Department of Justice, Brian Mulroney's government embarked on its own process of law reform. To this end, an anti-pornography bill was tabled in Parliament in June 1986. I shall now proceed to consider the statutory efforts by this government to reform Canadian obscenity law during the 1980s in closer detail.

4 2 3 The First Statutory Attempt to Reform Obscenity Law in Canada

Section 2 of the anti-pornography bill, Bill C-114, contained a proposed definition of pornography which read:

"[p]ornography' means any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other sexual activity."⁷⁰

This sweeping definition of prohibited pornography differed starkly from the recommendations of the Special Committee on Pornography as well as the definition of obscenity contained in section 163(8) of the Criminal Code. Since the definition made no reference to the phrase "undue exploitation of sex," Parliament appeared to have swept aside a substantial body of Canadian jurisprudence which sought to attribute legal meaning to the obscenity provision of the

⁶⁸ See *Special Committee on Pornography* at 102 (*supra*). See also, in general, John McLaren "The Fraser Committee: The Politics and Process of a Special Committee" in L Lowman et al *Regulating Sex* (1986) 46 - 48.

⁶⁹ The Committee indeed concluded that "there are magazines, films and videos solely for the purpose of entertainment whose depiction of women ... demeans them, perpetuate lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community ... Because of the seriousness of the impacts of this sort of pornography on the fundamental values of Canadians, we are prepared to recommend that the Criminal Code has an important role to play in defining what material may be available within our society": see *Special Committee on Pornography* at 103 (*supra*).

⁷⁰ Section 2 of Bill C-114 of 1986. My emphasis.

Criminal Code. Despite the strength of the feminist anti-pornography movement in Canada which framed pornography as an issue of violence and harm to women's right to equality and safety under the Canadian Charter and in light of the numerous efforts by the movement to lobby for law reform, Mulroney's government failed to act decisively and address women's concerns in its anti-pornography bill. Whereas the former (Liberal) government had instructed the Special Committee on Pornography to relate its analysis to the values that are fundamental to Canadian society and its constitutional order, the new Conservative government consciously refrained from using these terms of reference. Indeed, most Tory members of Parliament supported the idea of pornography as "a perversion of human sexuality."⁷¹ Shortly after it assumed power, government explicitly stated in the November 1984 Speech from the Throne that it considered pornography to be a social welfare issue rather than a legal (or even constitutional) matter. This meant that any legislative initiatives to control pornography had to support and strengthen family values and interests. Two years later, Barbara McDougall, the then Minister of State, reiterated the link between state control of pornography and the protection of the family in the Speech from the Throne. She elaborated:

"[a]s the Speech from the Throne stated, we are dedicated to the pursuit of one goal, that of a modern, tolerant and caring nation in which its citizens are secure and prosperous. To this end we intend to bring before the House some important legislative initiatives to support and strengthen the institution of the Canadian family, among them the introduction of measures to end violent and degrading forms of pornography involving women and men, legislation to take effective action against child prostitution and initiatives against the traffic in illicit drugs, which will help to improve the quality of life for Canadian families, for Canadian parents and, in particular, for Canadian young people."⁷²

The Conservative government thus clearly conceived of pornography as a threat to family values rather than a threat to the constitutional principles and values upheld in the Special Committee's Final Report. One member of Parliament went so far as to define pornography as a "dreadful type of cancer" and often compared pornography to drugs in its addictive and destructive effect on "the morals and dignity of this country."⁷³ Member of Parliament Jim Jepson expressed the alarm of many Conservatives when he argued that "[i]t is quite clear that [pornography] draws people into a vortex of dependency and addiction leading to increasingly more difficult tastes to satisfy and to a host of related personal problems ... The political and social traditions of our country have overwhelmingly supported our community's proper role in defending itself from the creeping social disintegration that is, in a continuous cycle, both a result and a cause of pornography, and a direct attack on the family unit which I believe is the foundation stone of our

⁷¹ *Hansard* House of Commons June 3, 1986 at 13910.

⁷² *Hansard* House of Commons October 7, 1986 at 166.

⁷³ Bill Attewell, Member of Parliament for Don Valley East. See *Hansard* House of Commons January 28, 1986 at 10243.

country.”⁷⁴ Thus by associating pornography with other social ills such as child abuse, violence against women and drug addiction, the Conservative government conceived of pornography as a social condition that required immediate reform.⁷⁵ These reform initiatives enjoyed strong support from various religious and family-oriented groups in Canada.⁷⁶ During the drafting of the bill, the Department of Justice was inundated with letters which requested tighter control of pornography than was recommended by the Special Committee on Pornography.⁷⁷ The consultative process between the Minister of Justice, John Crosbie, and senior civil servants, policy and research advisers at the Department of Justice further contributed to the conservative nature of the proposed anti-pornography bill. The first step that led to the drafting of Bill C-114 involved the outlining of policy options. Policy advisers were expected to inform the Minister about the environment in which the issue under consideration was situated. Advisers to the Minister of Justice apparently sketched a juridical climate which became increasingly restrictive,⁷⁸ citing a decision of the Manitoba Court of Appeal which argued against existing precedents and declared material that showed simulated vaginal, anal and oral intercourse as well as masturbation obscene.⁷⁹ Civil servants also informed Crosbie of the existence of two opposing groups that were involved in the campaign to reform Canadian obscenity law, namely feminist and religious/family-oriented groups. Since policy advisers were of the opinion that feminists ultimately favoured tougher control of sexually explicit material, they subsequently assured the ministry of strong feminist support for governmental initiatives to reform obscenity law.

In Canada, the drafting of any legislation at federal level takes place pursuant to a memorandum to Cabinet. In the case of Bill C-114, Cabinet - after consultation with policy advisers and members of the Conservative caucus - recommended that the Department of Justice proceed with statutory reform. The caucus, it was later revealed, was itself divided on the issue. The Quebec members of caucus were apparently not interested in tightening existing obscenity law. Their

⁷⁴ Jepson was Member of Parliament for London East: see *Hansard* House of Commons October 1, 1985 at 7237 - 7238.

⁷⁵ See, in general, Joseph Gusfield “Constructing the Ownership of Social Problems: Fun and Profit in the Welfare State” 1989 36(5) *Social Problems* 431.

⁷⁶ These included the Roman Catholic Church, the Interchurch Committee on Pornography and the United Church of Canada.

⁷⁷ See *Hansard* House of Commons March 18, 1985 at 3110 and *Hansard* House of Commons April 2, 1985 at 3609.

⁷⁸ See Lacombe “Bill C-114: The First Attempt at Pornography Law Reform” in *Blue Politics* 99 at 106 (*supra*).

⁷⁹ See *Regina v Video World* (1985) 36 Man R (2d) 68; 22 CCC (3d) 331 (Man CA).

reluctance encouraged conservative members of the caucus to increase their efforts to create a climate in favour of law reform. Since Cabinet was aware that the caucus was divided over the pornography issue (and possibly in an attempt to avert political embarrassment), Cabinet decided to involve the caucus in the process of policy making. Through the process of debate, the drafters of Bill C-114 - who were intent on smoothing things over in the caucus - began to lose sight of the interests of women's groups and came to represent solely the interests of religious and pro-family groups instead. Crosbie later concede that in the end, the bill "was not an attempt to pander to women's issues; that was only incidental."⁸⁰ The bill thus became an effort to overcome the division on social issues within the caucus itself and satisfy the concerns of conservative and liberal caucus members instead. Consequently, the (radical) feminist rationale that would have resulted in the prohibition of pornography with the object to promote and secure women's rights under the Canadian Charter all but vanished through the involvement of the Tory caucus in the process of policy making. The caucus thus opted for a rationale based on the relationship between law, morals and the protection of family values in which pornography was conceived as a vice that the law could eradicate with a view to promote a common political and moral concern.

Public reaction to Bill C-114 and its proposed definition of pornography was overtly critical. The bill was attacked by groups across the social and political spectrum for not diverging from the traditional approach which characterised existing obscenity law. Since the bill had sex rather than violence as its central concern, government was accused of being undemocratic and of imposing ultra conservative values on Canadian society. Women's groups and feminist organizations did not, however, voice a unanimous reaction to Bill C-114. The National Action Committee on the Status of Women (NAC), for example, rejected the bill in its entirety and refused to suggest ways in which it could be modified. NAC claimed that the bill did not address the power imbalance inherent to pornography with the result that the bill could not differentiate between pornography and erotica.⁸¹ The Canadian Coalition Against Media Pornography (CCAMP), however, expressed the opinion that the definition of pornography contained in the bill merely had to be re-written. The CCAMP was interested in modifying the bill's conception of pornography to centralize dominance and power imbalance rather than sexual explicitness *per se*. The Coalition also joined forces with the Canadian Advisory Council on the Status of Women (CACSW) and Canadians Concerned About Violent Entertainment (CCAIVE) who argued that the anti-pornography bill did not go far enough in proscribing sexually explicit material that is harmful and degrading with the result that "many foreseeable portrayals of physical harm and violence against women may be interpreted as being legal under the present

⁸⁰ See Lacombe *Blue Politics* 99 at 111 (*supra*).

⁸¹ Louise Dulude, then president of NAC was quoted in the *Toronto Star* June 11, 1986 to say that Bill C-114 "is extremely puritan and totally unacceptable."

draft.”⁸²

Most religious and family-oriented organizations were unanimous in their approval of the proposed anti-pornography bill. On the political front, a ministerial shuffle sent John Crosbie to the Department of Transport and Ramon Hnatyshyn to the Department of Justice. The newly appointed Minister of Justice took the public discontent over Bill C-114 seriously and sought to have it re-drafted. Consequently, Bill C-114 was never debated in the House of Commons. It died on the order paper on 28 August 1986 with the end of the Canadian parliamentary session.⁸³ The desire to facilitate statutory reform to Canadian obscenity law did not, however, receive a fatal blow. Indeed, a second bill was introduced by the newly appointed Minister of Justice in the spring of 1987.

4 2 4 Bill C-54: A Second Attempt at Statutory Reform

Bill C-54 was intended to serve as a statutory compromise between conservative groups and the feminist community.⁸⁴ This meant that the bill had to be drafted in such a way to capture an elusive middle ground. It not only had to draw enough support from back benchers in the House of Commons who represented family/religious interests, but had to be more palatable to the feminist community as well. It need not be argued that such a compromise would be extremely difficult to realize. The Ministry of Justice did not, however, shy away from this challenge. After the bill was tabled in May 1987, Hnatyshyn held a press conference in which he praised the statutory proposal as the result of intense consultations with various groups and individuals. He argued that Bill C-54 represented a “broad consensus in the Canadian public that there is no place for portrayals of child pornography, sexual violence and degradation in a sexual context.”⁸⁵ The compromise that Bill C-54 was intended to achieve found expression in a provision which allowed for the display of and access to erotic material. The bill defined erotica as “any visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose

⁸² See Joan Bercovitch and Ginette Busque “A Critique of Bill C-114 as Proposed Legislation on Pornography: Principles and Clause-By-Clause Analysis” *Canadian Advisory Council on the Status of Women* (1986) at 5. CACSW also proposed that the scope of Bill C-114 should be enlarged to encompass written material.

⁸³ When a parliamentary session ends, all pending legislation automatically ceases to exist. To be considered again, the proposed legislation has to be reintroduced when Parliament resumes for the next session.

⁸⁴ See Susan Cole “The Law: The Criminal Code and its Limitations” in *Pornography and the Sex Crisis* (1992) 68 at 77 (hereinafter referred to as *Pornography*).

⁸⁵ As reported in the *Toronto Star* May 23, 1987.

of the sexual stimulation of the viewer, of a human sexual organ, a female breast or the human anal region." Access to erotic material by anyone under eighteen years of age was prohibited. The public display of erotica to anyone was subject to the following regulation:

"[e]very person who displays any erotica in a way that is visible to a member of the public in a public place, unless the public must, in order to see the erotica, pass a prominent warning notice advising of the nature of the display therein or unless the erotica is hidden by a barrier or is covered by an opaque wrapper, is guilty of an offence punishable on summary conviction."

While Bill C-54 defined pornography roughly in line with the recommendations of the Special Committee on Pornography,⁸⁶ the bill was strongly prohibitive for it forbade the depiction of acts such as vaginal, anal and oral intercourse, lactation, menstruation and ejaculation.⁸⁷ Although socio-political conditions in Canada were ripe for change, government scrapped Bill C-54 in the autumn of 1988. Some commentators ascribe this to the fact that the bill was opposed by groups from both the right and left of the political spectrum.⁸⁸ Whereas religious and family-oriented groups thought of the bill as too accommodating (especially in its embrace of erotica), library boards in Canada perceived it as a threat to cultural freedom.⁸⁹ Conservative organizations - who

⁸⁶ See par 4 2 2 and accompanying footnotes (*supra*).

⁸⁷ The definition of pornography in Bill C-54 read:
 "Pornography is any visual matter that shows:
 (i) sexual conduct referred to in any of subparagraphs (ii) to (vi) and that involves or is conducted in the presence of a person who is, or is depicted as being or appears to be under the age of eighteen years or the exhibition for a sexual purpose of a human sexual organ, a female breast or the human anal region of, or in the presence of a person who is, or is depicted as being or appears to be under the age of eighteen years;
 (ii) a person causing, attempting to cause in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person;
 (iii) sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person or any other person in a sexual context;
 (iv) a degrading sexual act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or anus of that person or any other person or defecates, urinates or ejaculates onto another person whether or not the other person appears to be consenting or any such degrading act, or lactation or menstruation in a sexual context;
 (v) bestiality, incest or necrophilia; or
 (vi) masturbation or ejaculation not referred to in paragraph (iv) or vaginal or oral intercourse."

⁸⁸ See Lacombe "Bill C-54: The Impossible Compromise" in *Blue Politics* 117 at 123 (*supra*). See also Cole in *Pornography* 68 at 78 - 84 (*supra*).

⁸⁹ The Toronto Public Library Board thought that library personnel were particularly vulnerable to the bill. An analysis conducted by Edward Greenspan (a prominent criminal lawyer whose legal opinion was sought by

initially responded favourably to Bill C-54 - withdrew their support once legal counsel discovered that the bill contained numerous loopholes that could drastically liberalise an apparently conservative law. When the Inter Church Committee on Pornography submitted its concerns about the proposed bill to the Department of Justice,⁹⁰ the conservative campaign against pornography effectively ended with the recognition that the existing obscenity provisions of the Criminal Code could suitably be employed to ban undesirable sexually explicit material in Canada. Government thus found it impossible to strike the desired compromise. It could, of course, have pushed Bill C-54 through had it so wanted, for the Conservative Party held a majority in the House of Commons. But a lack of public support, especially from a large section of the Conservative Party's constituency, combined with pending general elections in 1988, served to diminish the interest of the Tory caucus in pornography. No further attempts to reform Canadian obscenity law followed. Then, five years after the second attempt to reform obscenity legislation with Bill C-54, the Supreme Court of Canada was called upon to revisit the pornography issue. My discussion of the landmark decision of the Supreme Court in *Regina v Butler*⁹¹ follows directly below.

4 3 PORNOGRAPHY, COMMUNITY TOLERANCE AND HARM DEFINED: THE JURISPRUDENCE OF THE SUPREME COURT OF CANADA

My discussion of the efforts by the Canadian Parliament to ensure a more effective regulation of sexually explicit material has shown the extent to which feminist, liberal and conservative sentiments have influenced the various attempts at legislative reform. Canadian jurisprudence can for that reason be classified as a hybrid of liberal-inspired obscenity law and (radical) feminist concerns about pornography. Although the radical feminist conception of pornography and its harm left a marked impression on Canadian constitutional jurisprudence, no Canadian

the Canadian Civil Liberties Association) found that many titles carried by public libraries in Canada would in fact be targeted by Bill C-54.

⁹⁰ The Committee expressed the concern that the bill could actually remove protection which existed under the obscenity provisions of the Criminal Code. The Committee also argued that the bill failed to adequately address the availability of sexually explicit magazines and consequently called for an outright ban on publications of this nature. Some sections of the bill, it was argued, would also impact negatively on existing obscenity law in that these would remove the possibility of censoring texts. The final problem expressed by the Committee was to the effect that the bill would not assist in controlling child pornography because it did not prohibit simulated sexual activity with children or the depiction of children as sexual objects.

⁹¹ [1992] 1 SCR 452; 89 DLR (4th) 449.

legislature or court ever contemplated the civil rights route followed by the cities of Minneapolis and Indianapolis in the United States. Instead, the Supreme Court of Canada upheld the existing obscenity provisions of the Criminal Code in *Regina v Butler* on the basis that pornography causes social harm. The *Butler* case served before the Supreme Court of Canada after the Manitoba Court of Appeal granted leave of appeal to both parties. Whereas the Crown appealed against a decision of the trial court which resulted in a partial acquittal of the accused,⁹² the accused appealed against the decision of the Manitoba Court of Appeal which entered convictions on all counts.⁹³ Council for the accused attacked the obscenity provisions of the Criminal Code⁹⁴ on the ground that they contravene the right to freedom of expression which is guaranteed under section 2(b) of the Canadian Charter of Rights and Freedoms. In my discussion of the Supreme Court's decision below, I shall first consider the facts which gave rise to the respective appeals, whereafter I shall embark on an exposition of the court's treatment of obscenity in relation to the various constitutional challenges raised by pornography in Canadian law, for in the words of Sopinka J, "[this] case requires the Court to address one of the most difficult and controversial of contemporary issues, that of determining whether, and to what extent, Parliament may legitimately criminalize obscenity."⁹⁵

4 3 1 The Facts in *Regina v Butler*

In August 1987, the accused, Donald Victor Butler, opened the "Avenue Video Boutique" in Winnipeg, Manitoba. The shop sold and rented sexually explicit videotapes and magazines as well as sexual paraphernalia. A sign was placed outside the store which read: "Avenue Video Boutique; a private members only adult video/visual club. Notice: if sex oriented material offends you, please do not enter. No admittance to persons under 18 years."

On 21 August 1987, members of the City of Winnipeg Police Force entered the accused's store with a search warrant and seized all the inventory.⁹⁶ The accused was subsequently charged with

⁹² (1989) 50 CCC (3d) 97. See also par 4 3 1 and accompanying footnotes (*infra*).

⁹³ (1990) 60 CCC (3d) 219. See also par 4 3 1 and accompanying footnotes (*infra*).

⁹⁴ Criminal Code RSC C-46 section 159 (now section 163) of 1985.

⁹⁵ At 453 (*supra*).

⁹⁶ The vast majority of the seized material was of a visual nature. Included in the numerous exhibits before the court were depictions of women being raped, sometimes portrayed as if enjoying the experience, sometimes resisting or attempting to resist. The material also included sex acts performed on subordinates by superiors or caretakers, including employer on employee, priest on penitent, doctor on nurse and nurse on patient. In some of the

173 counts: three counts of selling obscene material contrary to section 159(2)(a) of the Criminal Code,⁹⁷ 41 counts of possessing obscene material for the purpose of distribution contrary to section 159(1)(a) of the Criminal Code,⁹⁸ 128 counts of possessing obscene material for the purpose of sale contrary to section 159(2)(a) of the Criminal Code and one count of exposing obscene material to public view contrary to section 159(2)(a) of the Criminal Code. On 19 October 1987 the appellant re-opened the store at the same location. A second search warrant executed on 29 October 1987 culminated in the arrest on the premises of an employee, Norma McCord. After the accused was arrested at a later date, a joint indictment was laid against Butler and McCord. The joint indictment contained 77 counts under section 159 of the Criminal Code: two counts of selling obscene material contrary to section 159(2)(a), 73 counts of possessing obscene material for the purpose of distribution contrary to section 159(1)(a), one count of possessing obscene material for the purpose of sale contrary to section 159(2)(a) and one count of exposing obscene material to public view contrary to section 159(2)(a). The trial judge convicted the accused on eight counts relating to eight videos and convictions were entered against the co-accused with respect to two counts relating to two of the videos in question. Fines of \$ 1,000 per conviction were imposed on Butler and acquittals were entered on the remaining charges.⁹⁹ The Crown subsequently appealed the 242 counts on which the accused was acquitted by the trial court. The majority of the Manitoba Court of Appeal allowed the appeal of the Crown and entered convictions on all of the counts.¹⁰⁰ The accused was granted leave to cross-appeal to the Supreme Court of Canada.

4 3 2 The Decision of the Supreme Court

The Supreme Court had to address two constitutional issues which resulted from the appeal. First, the court had to ascertain whether section 163 of the Criminal Code of Canada violate

exhibits before the court, adult women were presented as children and some participants appeared to be children. In others, women were penetrated with objects, bound with rings through their nipples and hung handcuffed and nude from the ceiling. Some material portrayed men ejaculating on women's faces and into their mouths. A small segment of the seized material depicted sexual aggression against men, including bondage, penetration with objects, rape and beatings.

⁹⁷ RSC 1970 C-34; now section 163(2)(a) of the Criminal Code.

⁹⁸ RSC 1970 C-34; now section 163(1)(a) of the Criminal Code.

⁹⁹ (1989) 50 CCC (3d) 97 *per* Wright J.

¹⁰⁰ (1990) 60 CCC (3d) 219 *per* Huband JA (O'Sullivan JA and Lyon JA concurring); Twaddle JA and Helper JA dissenting.

section 2(b) of the Canadian Charter of Rights and Freedoms.¹⁰¹ In the event that section 163 of the Criminal Code was found to violate section 2(b) of the Charter, the second issue which the court had to address was whether section 163 could be demonstrably justified under section 1 of the Canadian Charter as a reasonable limit prescribed by law.

Sopinka J, who delivered the principal opinion of the court, commenced his judgment by emphasising the importance to understand the basis on which sexually explicit material may be tolerated in Canadian society. To this end, Sopinka J argued that

“[p]ornography can be usefully divided into three categories: (1) explicit sex with violence, (2)

101

Section 163 of the Criminal Code RSC C-46 of 1985 reads:

“163(1) Everyone commits an offence who,

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) Everyone commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

(c) offers to sell, advertise or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under section (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, “crime comic” means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.”

explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing. Violence in this context includes both actual physical violence and threats of physical violence."¹⁰²

Relating these three categories of pornography to section 163(8) of the Criminal Code, Sopinka J found that the first category, namely explicit sex coupled with violence, is expressly proscribed. In respect of the second category of pornography, Sopinka J argued that since sex coupled with crime, horror or cruelty would sometimes involve violence, this category of pornography is also covered by section 163(8) of the Criminal Code and that this would also be the case in instances of non-violent sex coupled with crime, horror or cruelty. This means that sexually explicit material which does not include violence would still fall within the scope of the Criminal Code when coupled with crime, horror or cruelty. The third category of pornography, namely explicit sex without violence that is neither degrading or dehumanizing is not, however, covered by section 163(8) of the Criminal Code, except if children are employed in its production.¹⁰³

¹⁰² At 470 (*supra*).

¹⁰³ At 470 (*supra*). Subsequent to *Regina v Butler*, a special provision on child pornography was enacted in the Criminal Code. Section 163.1 of the Criminal Code addresses the production, distribution, sale and possession of child pornography as well as defences under the Criminal Code. Section 163.1 reads:

"Child pornography

(1) In this section, "child pornography" means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity; or
(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

(b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

(3) Every person who imports, distributes, sells or possesses for the purpose of distribution or sale any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

(4) Every person who possesses any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

(5) It is not a defence to a charge under subsection (2) in respect of a visual

Sopinka J considered the statutory phrase "undue exploitation of sex" next. With a view to assess the interrelationship between the community standards test and the degrading and dehumanizing test, Sopinka J argued that an objective norm is required to serve as an arbiter to determine what would amount to an undue exploitation of sex. Since the arbiter is the community as a whole, it is the role of Canadian courts to determine what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. The stronger the inference of harm, the lesser the likelihood of tolerance. Harm, Sopinka J argued, would include any anti-social conduct resulting from exposure to the three categories of pornography such as, for example, the "physical or mental mistreatment of women by men."¹⁰⁴

Sopinka J then proceeded to apply his conception of harm and community tolerance to the three identified categories of pornography. He argued that the portrayal of sex coupled with violence "will almost always constitute the undue exploitation of sex."¹⁰⁵ In respect of the second category, he argued that explicit sex which is degrading or dehumanizing may be undue "if the risk of harm is substantial."¹⁰⁶ The final category of pornography, namely explicit sex that is not violent and neither degrading nor dehumanizing, is generally tolerated by Canadian society and will not, therefore, qualify as the undue exploitation of sex "unless it employs children in its production."¹⁰⁷ Having set out the Supreme Court's new framework for an assessment of

representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

(7) Subsections 163(3) to (5) apply, with such modification as the circumstances require, with respect to an offence under subsection (2), (3) or (4), 1993 c.46 section 2."

¹⁰⁴ At 470 (*supra*).

¹⁰⁵ At 471 (*supra*).

¹⁰⁶ At 471 (*supra*).

¹⁰⁷ At 471 (*supra*). In light of this new framework, the need to apply the internal necessities test would only arise if a work contains sexually explicit material that by *itself* would constitute the undue exploitation of sex. This means that the portrayal of sex must be viewed in *context* to determine whether that is the dominant theme of the work as a whole. A court will therefore have to

pornography, Sopinka J directed his attention to the two constitutional issues raised by the appeal, namely whether section 163 of the Criminal Code violates section 2(b) of the Canadian Charter and, if this was found to be the case, whether section 163 could be demonstrably justified under section 1 of the Canadian Charter. I shall now proceed to discuss these two aspects of the Supreme Court's decision in turn.

4.3.3 The First Constitutional Question: Does Section 163 Violate Section 2(b) of the Canadian Charter?

Section 2 of the Canadian Charter of Rights and Freedoms, *inter alia*, embodies a guarantee of the right to hold and express thoughts, ideas, beliefs and opinions. It reads:

"Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
- (c) freedom of peace and assembly; and
- (d) freedom of association."

The test to determine whether a violation of section 2(b) has occurred was outlined by the Supreme Court of Canada in *Irwin Toy Ltd v Québec (Procureur Général)*.¹⁰⁸ The enquiry is essentially twofold. First, a court must determine whether the activity in question is a mode of expression that falls within the meaning of section 2(b) of the Canadian Charter and secondly, whether government action, in purpose or effect, restricts freedom of expression. Sopinka J found in the present instance that the majority of the Manitoba Court of Appeal erred in two respects in its application of the test enunciated in *Irwin Toy Ltd v Québec (Procureur Général)* to determine whether section 163 of the Criminal Code violates the right to free expression. First, Sopinka J argued that Huband JA misinterpreted the distinction between purely physical activity and activity which has expressive content.¹⁰⁹ Although the subject matter of the material

determine whether the undue exploitation of sex is the main object of the work or whether the portrayal of sex is essential to the wider artistic, literary (or other similar) purpose. Since the threshold determination must be made on the basis of objective community standards, the impact of sexual explicitness when considered in context must be determined on the basis of tolerance.

¹⁰⁸ [1989] 1 SCR 927.

¹⁰⁹ The Appellate Judge had found that a "purely physical activity" (such as the parking of a motor vehicle) cannot be said to have expressive content. Consequently, "it is unnecessary to proceed beyond the first step [of the enquiry] because the materials are devoid of a 'meaning' ... the majority judgment in the *Irwin Toy* case acknowledges that '... some human activity is purely physical and does not convey or attempt to convey meaning.'" The Appeal Court thus concluded in *Irwin Toy Ltd v Québec (Procureur Général)*

under consideration “is clearly physical”, Sopinka J argued that this in itself did not mean that the material does not convey or attempt to convey meaning.¹¹⁰ Thus, while the material in the present instance is indeed “physical” it nevertheless “conveys ideas, opinions, or feelings.”¹¹¹ The second issue on which the Court of Appeal erred was its failure to draw a distinction between the content of the material and the mode of expression. The material under consideration “is the medium through which the meaning sought to be conveyed is expressed.”¹¹² And since the vehicle of expression is not inherently violent in the present instance, it does not fall outside the protected sphere of expression. In light of the view expressed by the Supreme Court in *Reference re ss 193 and 195.1(1)(c) of the Criminal Code*¹¹³ and in *Regina v Keegstra*,¹¹⁴ a generous approach to the protection afforded by section 2(b) of the Canadian Charter should be followed. Consequently, the activities portrayed in the seized material cannot be excluded from the guaranteed freedom on the basis of the conveyed content or meaning. This means that the meaning or message sought to be expressed need not be redeeming in the eyes of the court to merit constitutional protection. And since both the purpose and effect of section 163 of the Criminal Code is to restrict the communication of certain types of material based on its content, Sopinka J was in no doubt that this section infringes section 2(b) of the Canadian Charter.¹¹⁵ Having answered the first constitutional question in the affirmative, Sopinka J turned to consider whether this infringement is justified under the general limitation clause of the Canadian Charter.

434 The Second Constitutional Question: Is Section 163 Justified Under Section 1 of the Canadian Charter?

Before I embark on a discussion of the Supreme Court’s section 1 analysis, it may be useful to first briefly consider the object and components of the limitation clause of the Canadian Charter of Rights and Freedoms.

at 230 (*supra*) that the materials in question do not fall under the freedom of expression guarantee of the Canadian Charter.

¹¹⁰ At 472 (*supra*).

¹¹¹ At 472 (*supra*).

¹¹² At 473 (*supra*).

¹¹³ [1990] 1 SCR 1123, popularly referred to as the *Prostitution Reference* case.

¹¹⁴ [1990] 3 SCR 697. See also par 44 and accompanying footnotes (*infra*).

¹¹⁵ At 473 - 474 (*supra*).

4341 The Functions of and Foundation Test for Section 1 of the Canadian Charter

Section 1 of the Canadian Charter embodies both a general guarantee and limitation of the rights and freedoms enshrined therein. Section 1 reads:

“Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Section 1 has two distinct functions. First, it provides a constitutional guarantee of the rights and freedoms set out in the provisions of the Charter and secondly, provides an explicit exposition of the exclusive justificatory criteria against which any limitations on those rights and freedoms must be assessed. An infringement may only be justified under section 1 of the Canadian Charter if the impugned limitation is one which is prescribed by law.¹¹⁶ The foundation test to establish whether a limit is reasonable and demonstrably justified in a free and democratic society was set out by the Supreme Court in *Regina v Oakes*.¹¹⁷ First, the objective of the measures responsible for the limitation must be sufficiently important to warrant overriding a constitutionally protected right or freedom and, secondly, the impugned limitation must satisfy a three-step proportionality test.¹¹⁸ The proportionality branch of the test in *Regina v Oakes* balances societal interests with the interests of individuals or groups.¹¹⁹ First, the measures employed must be rationally connected to the objective being pursued.¹²⁰ This means that the measures must be carefully designed to achieve their objective, cannot be arbitrary, unfair or based on irrational considerations. Secondly, the means chosen to achieve the objective should impair the right or freedom in question as little as possible.¹²¹ This means that a choice must be made from a range of legislative means that impair the particular right or freedom as little as is reasonably

¹¹⁶ See par 4342 and accompanying footnotes (*infra*).

¹¹⁷ [1986] 1 SCR 103.

¹¹⁸ Canadian courts have on the whole been reluctant to reject the validity of the legislative objectives pursued by Parliament, but have held that the objective must be determined with reference to the intentions of Parliament at the time of enactment: see *Regina v Zundel* [1992] 2 SCR 731. The objective relied on in a section 1 analysis must also be one which falls within the authority of (in other words, be *intra vires*) the level of government that prescribes the limitation: see *Regina v Big M Drug Mart* [1985] 1 SCR 295.

¹¹⁹ See par 4344 and accompanying footnotes (*infra*).

¹²⁰ See par 43441 and accompanying footnotes (*infra*).

¹²¹ See par 43442 and accompanying footnotes (*infra*).

possible.¹²² Finally, the effects of the impugned limitation on the individual or group involved must not be disproportionate to the importance of the legislative objective sought to be achieved.¹²³

In light of these requirements, the question whether section 163 of the Criminal Code is in the present instance justified under section 1 of the Canadian Charter thus entails an enquiry in three parts. In the first stage of the enquiry it must accordingly be assessed whether section 163 qualifies as a limit prescribed by law.

4 3 4 2 Is Section 163 a Limit Prescribed by Law?

Counsel for the accused argued that section 163 of the Criminal Code is so vague that it becomes impossible to subject it to a section 1 analysis. In addressing this contention, Sopinka J argued that vagueness must be considered in relation to two issues, namely whether section 163 is so vague that it does not qualify as a “limit prescribed by law” and whether the section is so imprecise that it cannot constitute a reasonable limit. In respect of the first issue, the Supreme Court has on occasion held that the statutory provision must provide “an intelligible standard according to which the judiciary must do its work.”¹²⁴ It is therefore the task of the judiciary to interpret the terms found in the Criminal Code, especially since it does not define the terms “indecent”, “immoral” or “scurrilous”. If such interpretation yields an intelligible standard, Sopinka J argued, the threshold test for the application of section 1 of the Charter has been met. Sopinka J thus concluded in light of considerable judicial precedent on section 163(8) of the Criminal Code that it indeed provides an intelligible standard and thus qualifies as a limit prescribed by law.

4 3 4 3 Pressing and Substantial Objectives

The Crown argued that several pressing and substantial objectives existed which justified a

¹²² See *Regina v Chaulk* [1990] 3 SCR 1303 where the Supreme Court recognised that the precise means chosen at some point become merely a line-drawing exercise and judicial opinion should not be substituted for that of a democratically elected Parliament. See also *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* (*supra*).

¹²³ See par 4 3 4 4 3 and accompanying footnotes (*infra*). The onus to prove that the means limiting the right or freedom in question are reasonable and demonstrably justified in a free and democratic society rests on the party who seeks to uphold the limitation. The standard of proof is the civil standard of a preponderance of probabilities.

¹²⁴ In *Irwin Toy Ltd v Québec (Procureur Général)* at 983 (*supra*), cited with approval in *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69 at 94.

limitation of the freedom to distribute obscene materials. These objectives include the avoidance of harm from anti-social attitudinal changes that exposure to obscene material cause and public interest in maintaining a "decent society". In turn, counsel for the accused argued that the objective of section 163 is to have the state act as "moral custodian" in sexual matters and to impose subjective standards of morality.

Sopinka J agreed with Twaddle JA of the Court of Appeal that the common law objective to prohibit "immoral influences" as a threat to the morals or the fabric of society is no longer defensible in view of the Canadian Charter.¹²⁵ Sopinka J argued that "to impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."¹²⁶ The prevention of "dirt for dirt's sake" and allowing a majority to decide "what values should inform individual lives and then coercively imposing those values on minorities" are not legitimate objectives which would justify the violation of "one of the most fundamental freedoms enshrined in the Charter."¹²⁷ But on the other hand, the suggestion that Parliament does not have the right "to legislate on the basis of some fundamental conception of morality for the purpose of safeguarding the values which are integral to a free and democratic society" cannot be supported.¹²⁸ Indeed, Sopinka J argued, much of Canadian criminal law is based on moral conceptions of right and wrong and thus the "mere fact that a law is grounded in morality does not automatically render it illegitimate."¹²⁹ However, the overriding objective of section 163 of the Criminal Code "is *not* moral disapprobation but the *avoidance of harm to society*."¹³⁰ In support of this contention, Sopinka relied on the rationale established by Dickson CJ in *Towne Cinema Theatres v The Queen*¹³¹ and the conception of harm employed by the 1978 Report on Pornography by the Standing Committee on Justice and Legal Affairs. The Chief Justice stressed in the aforementioned case that section 163(8) of the Criminal Code seeks to target harm caused to society from an undue exploitation of sex, not simply from "lapses in propriety or good taste."¹³² The Standing Committee expressed its understanding of harm as

¹²⁵ At 476 (*supra*).

¹²⁶ At 476 (*supra*).

¹²⁷ At 476 (*supra*).

¹²⁸ At 476 (*supra*).

¹²⁹ At 476 (*supra*).

¹³⁰ At 477 (*supra*). My emphasis.

¹³¹ [1985] 1 SCR 494 (*supra*).

¹³² At 507 (*supra*).

follows in its Report on Pornography:

“[t]he clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.”¹³³

Sopinka J saw the enactment of section 163 of the Criminal Code as an attempt by Parliament to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they have a detrimental impact on individuals exposed to them and consequently on society as a whole. Even though “[o]ur understanding of the harms caused by these materials has developed considerably since that time,” this does not detract from the fact that “the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials.”¹³⁴ Moreover, Sopinka J argued that a permissible shift in emphasis was built into section 163 when it adopted the community standards of tolerance test as interpreted by the Canadian judiciary. Having determined that the prevention of harm to society is the objective of section 163, Sopinka J next had to determine whether this constituted a pressing and substantial concern to warrant a restriction on freedom of expression.

Sopinka J pointed out that the Supreme Court has recognised in *Regina v Keegstra*¹³⁵ that the harm caused by the proliferation of materials which seriously offend the values that are fundamental to Canadian society constitutes a substantial concern which justifies the restriction of freedom of expression. Sopinka J argued that, in his view, the harm sought to be avoided in the case of the dissemination of obscene materials *is similar to* the harm of hate propaganda. Coupled with the growing recognition among Canadian courts that the exploitation of women and children in publications and films can lead to “abject and servile victimization,”¹³⁶ Sopinka J concluded that

“if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have

¹³³ See the *Report on Pornography: Standing Committee of Justice and Legal Affairs* (popularly referred to as the MacGuigan Report) (1978) at 18:4.

¹³⁴ At 478 (*supra*).

¹³⁵ [1990] 3 SCR 697. See also par 44 and accompanying footnotes (*infra*).

¹³⁶ *Per* Nemetz CJ of British Columbia in *Regina v Red Hot Video Ltd* (1985) 45 CR (3d) (BCCA) at 43 - 44.

a negative impact on the *individual's* sense of self-worth and acceptance."¹³⁷

For centuries democratic societies have set certain limits to freedom of expression and legislation that proscribes obscenity thus constitutes a valid objective which justifies an encroachment on the right to freedom of expression.¹³⁸ Consequently, the advent of the Canadian Charter did not have the effect of depriving Parliament of a power which it has historically enjoyed. In fact, the prohibition of obscenity has been declared to be compatible with the Canadian Bill of Rights. In *Regina v Prairie Schooner News Ltd and Powers*¹³⁹ the court expressly stated that freedom of speech is not unfettered either in criminal or civil law. And since the Canadian Bill of Rights was intended to protect basic freedoms that are of vital importance to Canadians, it does not serve as a shield behind which obscenity may be disseminated without concern for criminal consequences.¹⁴⁰ Having found the objective of section 163(8) of the Criminal Code to be pressing and substantial, Sopinka J directed his attention to the next stage of the analysis, namely whether this statutory provision is rationally connected and proportional to its objective.

4 3 4 4 Proportionality

I pointed out above¹⁴¹ that the proportionality requirement under section 1 of the Canadian Charter involves an enquiry in three parts. First, a court must determine whether a rational connection exists between the impugned measure and its objective, secondly, whether there is minimal impairment of the right or freedom in question, and finally, whether a proper balance exists between the effects of the limiting measures and the legislative objective.

In assessing whether the proportionality test is met, Sopinka J relied on *Reference re ss 193 and*

¹³⁷ At 479 (*supra*). My emphasis. See also the observations of Anderson JA in *Regina v Red Hot Video Ltd* 34 CR (3d) (BCCA) at 50.

¹³⁸ Citing *Regina v Great West News Ltd Mantell and Mitchell* (1970) 4 CCC 307 *per* Dickson JA (as he then was) at 309: "... all organized societies have sought in one manner or another to suppress obscenity. The right of the state to protect its moral fibre and well-being has long been recognized, with roots deep in history. It is within this frame that the Courts and Judges must work."

¹³⁹ (1970) 1 CCC (2d) 251.

¹⁴⁰ At 271 (*supra*). The enactment of section 163 of the Criminal Code is also consistent with the international obligations of Canada under the Agreement for the Suppression of the Circulation of Obscene Publications and the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications.

¹⁴¹ See par 4 3 4 1 and accompanying footnotes (*supra*).

195.1(1)(c) of the Criminal Code¹⁴² where Dickson CJ expressly stated that the any infringement of a Charter right should be analysed within the particular context of the case.¹⁴³ Since the right to freedom of expression is infringed in the present instance, the values which underlie the protection of freedom of expression must be considered. Traditionally, Sopinka J argued, the values which underscore freedom of expression relate to the search for the truth, participation in the political process and individual self-fulfilment. But although these values implicate that the objective of section 163 of the Criminal Code is not to inhibit the celebration of human sexuality, Sopinka J found the realities of the pornography industry to be far removed from the submission by the British Columbia Civil Liberties Association. The Civil Liberties Association submitted in the present case that "good" pornography has value because "it validates women's will to pleasure" and "celebrates female nature."¹⁴⁴ Moreover, the Civil Liberties Association argued that "good" pornography "validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture" with the result that "[p]ornography when it is good celebrates both female pleasure and male rationality."¹⁴⁵ A more accurate picture of pornography, Sopinka J countered, was sketched by Shannon J in *Regina v Wagner*¹⁴⁶ when he observed that

"[w]omen, particularly, are deprived of unique human character or identity and are depicted as sexual playthings, hysterically and instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts."¹⁴⁷

Consequently, the kind of expression which is sought to be advanced in the present instance does not stand on equal footing with other kinds of expression which "directly engage the 'core' of the freedom of expression values."¹⁴⁸ And since the Supreme Court has on occasion held that an economic motive for expression means that restrictions on the expression might "be easier to

¹⁴² (1990) 56 CCC (3d) 65. The Chief Justice found that the activity to which sections 193 and 195.1(1)(c) of the Criminal Code were directed is expression with an economic purpose with the result that communications regarding an economic transaction of sex for money cannot be said to lie at, or even near, the core of the constitutional guarantee of freedom of expression.

¹⁴³ At 73 - 74 (*supra*).

¹⁴⁴ At 482 (*supra*).

¹⁴⁵ At 482 (*supra*).

¹⁴⁶ (1985) 43 CR (3d) 318.

¹⁴⁷ At 323 (*supra*).

¹⁴⁸ At 482 (*supra*).

justify than other infringements,"¹⁴⁹ the conclusion that pornography is far removed from the values which underpin freedom of expression is further buttressed by the fact that the material under consideration constitutes expression which is motivated - in the overwhelming majority of cases - by economic profit. Having found that the restrictions imposed by section 163 of the Criminal Code could be justified since they do not implicate the core values which underlie the protection of freedom of expression, Sopinka J accordingly directed his attention to whether a rational connection exists between section 163(8) and its objective.

4 3 4 4 1 Rational Connection

Sopinka J commenced his examination of the first aspect of the proportionality enquiry under section 1 of the Canadian Charter with the significant statement that "[t]he message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda." Since obscenity "wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentation," the rational link between section 163 of the Criminal Code and the objective of the Canadian legislature accordingly relates to the "actual causal relationship between obscenity and the risk of harm to society at large."¹⁵⁰ Sopinka J conceded, however, that social scientific studies have failed to postulate any causal relationship between pornography and the commission of violent crimes, the sexual abuse of children or the disintegration of communities and society. But while a direct link between pornography and harm to society may be difficult to establish, Sopinka J found it "*reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.*"¹⁵¹ In the face of inconclusive evidence on the matter, Sopinka J relied on case law. In *Irwin Toy Ltd v Québec (Procureur Général)*¹⁵² where the Supreme Court made it clear that in choosing its mode of intervention, it is sufficient that Parliament had a *reasonable basis* (on the evidence tendered that television advertising directed at young children is *per se* manipulative) to conclude that the ban on all television advertising directed at children impaired freedom of expression as little as possible given the legislature's pressing and substantial objective.¹⁵³ The Supreme Court also recognised that a margin of appreciation may be afforded to formulate legitimate objectives based

¹⁴⁹ In *Rocket v Royal College of Dental Surgeons of Ontario* (1990) 71 DLR (4th) 68 at 79; [1990] 2 SCR 232; 47 CRR 193.

¹⁵⁰ At 482 (*supra*).

¹⁵¹ At 483 (*supra*). My emphasis.

¹⁵² (1989) 58 DLR (4th) 577.

¹⁵³ At 626 (*supra*).

on somewhat inconclusive social scientific evidence.¹⁵⁴ Similarly, in *Regina v Keegstra*¹⁵⁵ the absence of proof of a causal link between hate propaganda and hatred of an identifiable group was discounted as a determinative factor in assessing the constitutionality of the hate speech provisions of the Criminal Code.¹⁵⁶ Sopinka J thus found that Parliament is entitled to have a "reasoned apprehension of harm resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations."¹⁵⁷ He therefore concluded that there was a sufficiently rational link between the criminal sanction contained under section 163 of the Criminal Code (which demonstrates Canadians' disapproval of the dissemination of materials which potentially victimize women and which restricts the negative influence which such materials have on changes in attitudes and behaviour) and the objective. Sopinka J thus had to proceed to the second stage of the proportionality test, namely whether section 163 of the Criminal Code constitutes a minimal impairment on freedom of expression.

4 3 4 4 2 **Minimal Impairment**

In determining whether alternative, less intrusive legislative measures could have been employed, the Supreme Court has previously stressed that although it is not necessary for legislation to be perfect, it must be appropriately tailored in the context of the infringed rights.¹⁵⁸ Likewise, the court has also stressed that it will not, in the name of minimal impairment, adopt a restrictive approach and require Parliament to choose the least ambitious means to protect vulnerable groups.¹⁵⁹

Sopinka J identified several factors which substantiate his finding that section 163 of the Criminal Code minimally impairs freedom of expression in the present instance. First, section 163(8) is designed to catch material that creates a risk of harm to society and therefore only proscribes violent, degrading or dehumanizing pornography. And since it is sufficient for Parliament to have a reasonable basis to conclude that harm will result, actual proof of harm is not required. Secondly, material which has scientific, artistic or literary merit is not captured by section 163(8) of the Criminal Code. Fears that the statutory definition of pornography will

¹⁵⁴ At 623 (*supra*).

¹⁵⁵ [1990] 3 SCR 697. See also par 4 4 and accompanying footnotes (*infra*).

¹⁵⁶ At 700 (*supra*).

¹⁵⁷ At 700 (*supra*).

¹⁵⁸ In *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* at 75 (*supra*).

¹⁵⁹ In *Irwin Toy Ltd v Québec (Procureur Général)* at 629 - 630 (*supra*).

target films, photographs or books which have scientific, artistic or literary value are thus unfounded. Thirdly, in considering whether section 163 minimally impairs freedom of expression, it is legitimate for a court to take into account Parliament's previous abortive attempts to replace the statutory definition with one that is more explicit. The Supreme Court has indeed recognised that it is legitimate to take into account the fact that earlier provisions and proposed alternatives were thought to be less effective than the statutory provision that is presently being challenged.¹⁶⁰ Since attempts to provide exhaustive definitions of obscenity in Canadian law have been shown to be destined to fail,¹⁶¹ Sopinka J argued that the only practicable alternative would be to strive towards a more abstract definition of pornography which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which section 163 of the Criminal Code is directed. In light of the intractable nature of the problem and the impossibility of formulating a precise definition of a notion which is inherently elusive, the standard of "undue exploitation" established by section 163(8) of the Criminal Code is thus appropriate.¹⁶² Fourthly, since only the public distribution and exhibition of obscene material is at issue, section 163(8) of the Criminal Code does not impact on the private use or viewing of obscene materials.¹⁶³

Finally, Sopinka J turned to address the contentions of the Canadian Civil Liberties Association and the Manitoba Association for Rights and Liberties that the objectives of section 163 could be achieved by alternative, less intrusive measures. Both associations argued that time, manner and place restrictions would be preferable to outright prohibition and that more effective techniques therefore exist to promote the objectives of Parliament. Sopinka J outrightly rejected both contentions. He argued with respect to the first contention that once it has been established that the objective of a statutory provision is the avoidance of harm caused by the "degradation which many women feel as 'victims' of the message of obscenity, and of the negative impact exposure to such material has on perceptions and attitudes towards women, it is untenable to argue that these harms could be avoided by placing restrictions on access to such material."¹⁶⁴ Consequently, making the material more difficult to obtain by increasing their cost and reducing their availability does not achieve the same objective. Once Parliament has reasonably concluded

¹⁶⁰ In *Irwin Toy Ltd v Québec (Procureur Général)* (*supra*).

¹⁶¹ For a discussion of two attempts at statutory reform by the Parliament of Canada during the 1980s, see par 4 2 3 and par 4 2 4 and accompanying footnotes (*supra*).

¹⁶² At 485 - 486 (*supra*).

¹⁶³ At 486 (*supra*), citing *Regina v Rioux* [1970] 3 CCC 149 at 151 - 152; 10 DLR (3d) 196; [1969] 1 SCR 599.

¹⁶⁴ At 486 (*supra*).

that certain acts are harmful to certain groups in society in general, it would be inconsistent - if not hypocritical - to argue that such acts could be committed in more restrictive conditions. In either case the harm sought to be avoided would remain the same. With respect to the second contention by the associations (namely that there are more effective techniques to promote the objectives of Parliament, such as civil remedies to rape victims, education of law enforcement agencies and society in general), Sopinka J pointed out that many of these suggested alternatives take the form of responses to the harm engendered by negative attitudes towards women. Since the role of section 163 is to control the dissemination of the very images that contribute to such attitudes, the measures chosen by Parliament far surpass the suggested alternatives given the gravity of the harm and the threat to the values at stake. Education and counselling may well play a supportive role, Sopinka J argued, but they do not represent the sole legitimate means of addressing the phenomenon of pornography.

The final aspect which Sopinka J had to consider under the proportionality test was whether the effects of section 163 of the Criminal Code so severely impact on freedom of expression that the legislative objective is outweighed by the infringement.

4 3 4 4 3 Balancing the Effects with the Legislative Objective

Sopinka J found that the infringement on freedom of expression is confined in the present instance to a measure designed to prohibit the distribution of sexually explicit material accompanied by violence as well as non-violent degrading or dehumanizing material. Sopinka J argued that since this kind of expression lies far removed from the core of the guarantee of freedom of expression, it appeals only to the most base aspect of individual fulfilment. The objective of section 163, on the other hand, is of fundamental importance in a free and democratic society, for it is aimed at the avoidance of harm which Parliament has reasonably concluded will be caused directly or indirectly to marginalised and vulnerable individuals or groups by the distribution of such material. Since section 163 thus seeks to enhance respect for all members of Canadian society as well as non-violence and equality in their relations with each other, Sopinka J concluded that the restriction of freedom of expression did not outweigh the importance of the legislative objective of section 163 of the Criminal Code in the present instance.

Consequently, although section 163 of the Criminal Code of Canada restricted section 2(b) of the Canadian Charter of Rights and Freedoms, Sopinka J found the provision demonstrably justified under section 1 of the Charter as a reasonable limit prescribed by law. In light of the new constitutional framework established by the Supreme Court, Sopinka J accordingly allowed

the appeal by Butler and directed a new trial on all charges.¹⁶⁵

4 3 5 A Critical Evaluation of the Supreme Court's Conception of Pornography and Harm in *Regina v Butler*

On first reading the decision of the Canadian Supreme Court in *Regina v Butler*, one is tempted to share Catharine MacKinnon's view that "[t]his is a stunning legal victory for women, this is of world historic importance."¹⁶⁶ This impression largely stems from the court's understanding of harm and due recognition of the social context within which adult heterosexual pornography is situated. Upon closer inspection, however, a number of difficulties are revealed in the court's assessment of pornography in relation to the Canadian Charter of Rights and Freedoms. My discussion of *Regina v Butler* will accordingly address both the positive and negative aspects of the Supreme Court's treatment of pornography.

By far the most positive aspect of the Supreme Court's decision relates to the fact that it elected to employ an equality rationale in its examination of the constitutionally accountable harm of pornography. The recognition that pornography is much more commonplace, socially accepted and widely distributed across class, race and geographical boundaries than United States courts are prepared to acknowledge, enabled the Canadian Supreme Court to assess pornography in a gender-specific context in relation to its effect on women's social standing. And by employing the concepts of violence, degradation and dehumanization in its discourse on pornography, the Supreme Court conceptualised a (legal) definition of pornography that is sensitive to the interplay between gender-specific degradation, dehumanization and violence in a context of sexual explicitness.

On the question of harm, the Supreme Court took a bold step in the light of what it perceived as inconclusive scientific evidence to argue that pornography presents a(n) (appreciable) risk of social harm. The court was thus prepared to, in principle, provide temporary closure on the issue in the absence of direct factual evidence about the consequences of pornography. As a matter of principle, the Supreme Court presumed that legal action against pornography is justified not only in view of the constitutional considerations at play, but also because evidence about a direct link between pornography and acts of sexual violence against women is never likely to manifest *unless* the presumption is embraced. The court thus acted on the premise that a legal system will never know the effects of a prohibition on a misogynist mode of expression unless it implements

¹⁶⁵ At 489 (*supra*).

¹⁶⁶ As quoted in the *Globe and Mail* February 29, 1992. MacKinnon prepared the brief *amici curiae* of the Women's Legal Education and Action Fund (LEAF) in the present proceedings.

a restrictive policy. In such situations the law is required to, in the words of William James, "run ahead of scientific evidence"¹⁶⁷ on the basis of principles which require action as a means to obtain the requisite evidence. The evidence, once available, may well prove to contradict the presumption, but the closure is temporary only in the sense that some (legal) action is taken, the discourse itself is not concluded. In fact, the stance assumed by the Supreme Court in the absence of scientific evidence is likely to engender and maintain public scrutiny and debate. And it is on the basis of this presumption about the risk of pornography that the Supreme Court was in a position to conceptualise harm and consider its consequences.

I see the Supreme Court's conception of the harm of pornography to represent a partial shift from the traditional liberal tenets of individual autonomy and rationality¹⁶⁸ and the assumptions which are typically seen to underpin the right to freedom of expression.¹⁶⁹ Consequently, the notion of obscenity lost its moralistic connotation as an affront to the sensibilities of the average person because, in the words of Sopinka J, "[t]he judiciary is not *supposed* to be morality police."¹⁷⁰ Since the prevention of harm to society is a constitutionally valid reason to restrict freedom of expression, pornography which degrades or dehumanises women is deemed to carry an appreciable risk of harm, even in the absence of violence. And since society is harmed by violent, degrading or dehumanising images of women, community standards of tolerance are interpreted in relation to the desire to achieve equality between the sexes. Therefore, by not reducing the harm of pornography to prurience or offensiveness, the Supreme Court recognised equality both as a constitutional value and mandate.

A striking similarity exists between the Supreme Court's conception of the harm of pornography and the rationale of the ordinance drafted by Andrea Dworkin and Catharine MacKinnon for the City of Indianapolis which was declared unconstitutional under the First Amendment to the

¹⁶⁷ See "The Will to Believe" as quoted by Hilary Putman "A Reconsideration of Deweyan Democracy" 1990 63 *University of Southern California Law Review* 1671 at 1690.

¹⁶⁸ For a comprehensive discussion and critique of the philosophical tenets of liberal thought, see Chapter 2 of this dissertation par 2 3 1 - par 2 3 2 and accompanying footnotes (*supra*).

¹⁶⁹ For a comprehensive discussion and critique of the assumptions which underpin the (modern) doctrine of freedom of expression, see Chapter 3 of this dissertation par 3 4 and accompanying footnotes (*supra*). See also par 4 3 4 4 (*supra*) and par 4 4 4 (*infra*).

¹⁷⁰ See "Should Speech that Causes Harm be Free?" in J Duncan (ed) *Between Speech in Silence: Hate Speech, Pornography and the new South Africa* (1996) 128 at 136 (hereinafter referred to as *Between Speech and Silence*). My emphasis.

United States Constitution.¹⁷¹ My discussion of the Indianapolis ordinance in the previous chapter revealed that the ordinance sought to proscribe depictions which reduce women to sexual objects who enjoy pain and humiliation, rape, torture or mutilation.¹⁷² Since the ordinance was clearly aimed at the prevention of degradation, torture and exploitation, it is very likely, I believe, that sexually explicit material of such a nature would in fact fall foul of section 163(8) of the Criminal Code. The United States Court of Appeals of the Seventh Circuit nevertheless found the ordinance unconstitutional as an impermissible restriction of the content of speech. Since the ordinance was found to dictate an approved view of women, the ordinance could not withstand First Amendment scrutiny, even though the court accepted the premise of the ordinance to the effect that depictions of the subordination of women (such as the portrayal of women enjoying rape or humiliation) may lead to social inequality and even physical harm. Given that the material which the Indianapolis ordinance sought to proscribe would fall into either of the two categories of pornography defined by the Canadian Supreme Court in *Regina v Butler* (namely explicit sex coupled with violence or explicit sex which degrades or dehumanizes), it is quite reasonable to conclude that such material would violate Canadian law and that the ordinance would in fact be deemed a reasonable and demonstrably justified restriction of freedom of expression under the Canadian Charter of Rights and Freedoms.

There are, however, a number of aspects of the Supreme Court's decision in *Regina v Butler* which raise particular difficulties. One such difficulty arises from the use of the terms "obscenity" and "pornography" by the majority of the Supreme Court in relation to the material under discussion. I pointed out in the previous chapter that due to the influence of United States First Amendment jurisprudence, obscenity carries a long established moralistic connotation.¹⁷³ Pornography, on the other hand, bears a definitive, feminist meaning. The manner in which the Supreme Court addresses the issue, does show, however, that the majority of the court leans toward a (radical) feminist notion of pornography. But in essence, the Supreme Court's reasoning remains firmly rooted in the liberal tradition. Consequently, the court still subscribes to a First Amendment inspired analysis of adult heterosexual pornography as a right to freedom of expression issue. This conception of pornography produces an inevitable balancing of freedom of expression with other constitutional values. In the present instance, the court's framework necessitated an evaluation of freedom of expression in relation to the values of equality and (individual) autonomy. As a consequence, the court proceeds from the assumption

¹⁷¹ In *American Booksellers Association Inc v Hudnut* 771 F2d 323 (1985); affirmed 475 US 1001; appeal denied 475 US 1132 (1986).

¹⁷² See Chapter 3 of this dissertation par 3 5 1, especially par 3 5 1 1 - par 3 5 1 4 and accompanying footnotes (*supra*).

¹⁷³ See Chapter 3 of this dissertation par 3 4, especially par 3 4 1 - par 3 4 4 and accompanying footnotes (*supra*).

that any legislative policy which seeks to proscribe sexually explicit material must be demonstrably based on a moral position. And since the justification of a such a legislative policy is constituted (in part) by the values of autonomy and equality,¹⁷⁴ the value of autonomy is inevitably prioritised as a necessary condition to legitimise public policy. State intervention is therefore justified in the interest of the individual rather than in the interest of a particular marginalised and disempowered class in society.

This is borne out by the Supreme Court's standard of obscenity. On the one hand, the court subscribes to established Supreme Court doctrine and thereby both agrees that the matter must be assessed in relation to the standard of decency which prevails in the community¹⁷⁵ and recognises that community standards inevitably imply varying degrees of tolerance.¹⁷⁶ Yet, at the same time, the court maintains that it is reasonable to presume that exposure to degrading, dehumanising or violent images is related to changes in attitudes and beliefs, thereby effectively advocating a presumption that is firmly grounded in radical feminist thought. It would therefore seem as if the Supreme Court sought an elusive compromise between traditional liberal inspired notions about obscenity and individual freedom and autonomy and radical feminist concerns about pornography and women's constitutional interests in equality, dignity and physical integrity.

To my mind, three further consequences result from the Supreme Court's endeavour to accommodate traditional notions about obscenity in its assessment of pornography. The first consequence is that only two categories of pornography are deemed to bear constitutional ramifications, secondly, section 163(8) of the Criminal Code is interpreted to the effect that it does not suppress the "celebration of human sexuality" and, finally, the court effectively fails to appreciate the complex private/public character of (sexual) violence.

In its assessment of pornography in terms of section 163(8) of the Criminal Code, the Supreme Court found only two categories of sexually explicit material harmful, namely explicit sex coupled with violence and sexually explicit material that is degrading or dehumanising. The majority of the court thus surmised that Parliament has the right to legislate on the basis of some fundamental conception of morality for the purpose of safeguarding the values which are integral to a free and democratic society. According to the court, these values are harmed when women

¹⁷⁴ See, in general, David Dyzenhaus "Pornography and Public Reason" 1994 7(2) *Canadian Journal of Law and Jurisprudence* 261 at 276 - 278.

¹⁷⁵ See *Brodie v The Queen* (*supra*).

¹⁷⁶ See *Towne Cinema Theatres Ltd v The Queen* (*supra*).

are portrayed as "objects for sexual exploitation and abuse."¹⁷⁷ The majority of the court made it clear that the harm in this instance is to the "individual's sense of self-worth and acceptance"¹⁷⁸ and consequently, the object of section 163(8) of the Criminal Code is to achieve "true equality between male and female persons."¹⁷⁹ Explicit sex coupled with violence and sexually explicit degrading or dehumanising depictions will therefore not be tolerated by Canadian society either because these categories of pornography cause harm or because the risk of harm is substantial.¹⁸⁰

If this is the (constitutional) rationale for the prohibition of pornography, why then only target two categories of sexually explicit material? Non-violent (and supposedly non-degrading or dehumanising) pornography impacts on the very same (constitutional) values identified by the Supreme Court as those identified in relation to the first two categories of pornography. Surely so-called "soft pornography" also objectifies women and impacts on the individual's sense of self worth and acceptance? The majority of the court therefore employs an ambiguous logic when viewed in the context of their established rationale. The mere fact that Canadians may tolerate pornography that is non-violent, degrading or dehumanising does not mean that pornography which falls into these categories bears no constitutional consequences. If the rationale for the prohibition of pornography is the prevention of harm to certain groups in society and the harm is seen as negative attitudes engendered by sexually explicit images towards women, I find it puzzling that so-called soft pornography could possibly escape constitutional impugment. Surely the sexual objectification which stands central to all adult heterosexual pornography constitutes a threat to the very values of autonomy and equality which the Supreme Court believes underscores (Canadian) public policy on pornography?

I also find the Supreme Court's understanding of the legislative aim of section 163(8) of the Criminal Code problematic. The reasoning that section 163(8) is not aimed at the suppression of the "celebration of human sexuality",¹⁸¹ but at a vision of sexuality which deprives women of the status of autonomous actors instead, again turns on the idea that the core values which are worthy of constitutional protection are those that are associated with freedom of expression. Individual autonomy and self-fulfilment are thus understood to be furthered by affording constitutional protection to non-violent, degrading or dehumanising sexually explicit material. The Supreme Court's interpretation of the ambit of section 163(8) of the Criminal Code can

¹⁷⁷ At 479 (*supra*).

¹⁷⁸ At 479 (*supra*).

¹⁷⁹ At 479 (*supra*).

¹⁸⁰ At 470 - 471 (*supra*).

¹⁸¹ At 499 (*supra*).

therefore only be understood to mean that so-called "soft pornography" constitutes a celebration of human sexuality. It goes without saying that considerable disagreement exists on the issue of what would constitute an acceptable portrayal of women's sexuality. By not giving attention to this disagreement, the Supreme Court conveniently swept aside one of the most controversial aspects of the pornography debate. And by avoiding to discuss this complex and highly contentious issue, the court's understanding - and rationale established in respect of - the two categories of pornography that are proscribed by section 163(8) of the Criminal Code is also called into question.

The final aspect of the Supreme Court's assessment of pornography that I find problematic relates to the court's failure to appreciate the complex private/public character of (sexual) violence. My discussion of *Regina v Butler* revealed that the majority of the court restricted their analysis to the public distribution and exhibition of sexually explicit material. Although technically in step with the true scope of section 163(8), one would have expected the majority of the court to react to the difficulty that radical feminists have highlighted in respect of a strict demarcation between the public and private sphere. It is to be welcomed that the Supreme Court related the problem of pornography to women's status in society, but it remains unfortunate that the court circumvented the issue relating to the harm caused to women by pornography in the private sphere. The court thus seems to lean over to an extreme libertarian position in spite of having argued (and evidently accepted)¹⁸² that exposure to pornography has a negative impact on perceptions and attitudes towards women. Although women cherish personal autonomy, in practice, the notion of autonomy has been used to protect an abusive partner from criminal sanction instead of women from an abusive partner. Similarly, despite the high value set on the privacy of the home and the centrality attributed to intimate relations, all too often the notion of privacy and intimacy provides both the opportunity for violence and the justification for non-interference.¹⁸³ Therefore, although the Supreme Court is prepared to assume - even in the absence of scientific proof - that pornography carries an appreciable risk of harm and that object of section 163(8) of the Criminal Code is the avoidance of this harm, the court fails to draw this assumption to its logical conclusion, namely that it is as reasonable to presume that violent, degrading or dehumanising sexually explicit images (or even non-violent, non-degrading or non-dehumanising images) equally impact on women in the private sphere.

I shall now proceed to assess the implications of so-called hate propaganda in relation to the Canadian Charter of Rights and Freedoms.

¹⁸² At 486 (*supra*).

¹⁸³ See, in general, Jennifer Nedelsky "Violence against Women: Challenges to the Liberal State and Relational Feminism" in I Shapiro and R Hardin (eds) *Political Order* (1998) 454 at 473 - 477.

44 PORNOGRAPHY AS THE WILFUL PROMOTION OF HATRED? A CRITICAL ASSESSMENT OF THE CANADIAN SUPREME COURT'S APPROACH TO HATE PROPAGANDA

The debate on hate speech (or hate propaganda) under Canadian law - as in the case of pornography - necessitates due consideration of the Canadian constitutional order, its sensitivity to historical marginalisation and commitment to multiculturalism and fundamental (societal) values. An analysis of the extend to which Canadian constitutional law sanctions the advocacy of hatred engages sections 1, 2(b), 15, 27 and 28 of the Canadian Charter of Rights and Freedoms. Section 1 of the Charter again emerges as the central, preeminent provision. As I have indicated above,¹⁸⁴ section 1 guarantees the rights and freedoms set out in the Canadian Charter subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Whereas section 2(b) of the Charter contains the freedom of expression guarantee,¹⁸⁵ section 15 embodies the guarantee of equality. Section 15 of the Canadian Charter reads:

"Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical or mental disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."¹⁸⁶

Section 27, a multicultural section, and section 28, which guarantees the rights in the Charter equally to both sexes, assist with the interpretation of the Canadian Charter. Section 27 provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians." Section 28 states that

¹⁸⁴ For the full text as well as a discussion of the functions and foundation test for section 1 of the Canadian Charter, see par 4 3 4 1 and accompanying footnotes (*supra*).

¹⁸⁵ For the full text as well as a discussion of section 2(b) of the Canadian Charter, see par 4 3 3 and accompanying footnotes (*supra*).

¹⁸⁶ Section 15 of the Canadian Charter superseded section 1(b) of the Charter on April 17, 1985. Whereas section 1(b) applied only to the federal legislature, section 15 applies to both Parliament and the provincial legislatures. For a discussion of section 1(b) of the Canadian Charter, see Gold "Equality before the Law in the Supreme Court of Canada" 1980 18 *Osgoode Hall Law Journal* 336.

"[notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equality to male and female persons.]"

4 4 1 Hate Propaganda and Freedom of Expression: *Regina v Keegstra*

Regina v Keegstra was heard by the Supreme Court of Canada in conjunction with two similar appeals, namely *Regina v Andrews and Smith*¹⁸⁷ and *Canada (Canadian Human Rights Commission) v Taylor*.¹⁸⁸ *Keegstra* and *Andrews* were both concerned with the constitutional validity of section 319(2) of the Criminal Code¹⁸⁹ which prohibits the wilful promotion of hatred (other than in private conversation) towards any section of the Canadian public distinguished by colour, race, religion or ethnic origin.¹⁹⁰ *Canada (Canadian Human Rights Commission) v Taylor* raised the issue of the constitutional validity of section 13(1) of the Canadian Human

¹⁸⁷ [1990] 3 SCR 870.

¹⁸⁸ [1990] 3 SCR 892.

¹⁸⁹ Criminal Code RSC C-46 of 1985.

¹⁹⁰ The relevant provisions of section 319 of the Criminal Code RSC C-46 of 1985 reads:

(2) Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

(6) No proceedings for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as in section 318 [('any section of the public distinguished by colour, race, religion or ethnic origin' in section 318(4))];

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations."

Rights Act,¹⁹¹ a statutory provision that prohibits the communication of hate messages over the telephone. In all three cases, the Supreme Court was called upon to decide whether the statutory provisions in question infringed the guarantee of freedom of expression found in section 2(b) of the Canadian Charter and if so, whether these infringements could be justified under section 1 of the Charter. Of the three, *Regina v Keegstra* was the leading decision in that it set out the approach adopted by the majority in the other two cases.¹⁹² Moreover, *Keegstra* also established the normative constitutional environment which enabled the Supreme Court in *Regina v Butler* to accept the notion that certain categories of pornography cause social harm. My discussion of the Supreme Court's landmark decision in *Regina v Keegstra* follows next.

4 4 2 The Facts in *Regina v Keegstra*

James Keegstra, an Alberta high school teacher, was charged under section 319(2) of the Criminal Code with the wilful promotion of hatred against an identifiable group by communicating anti-Semitic statements to his students. Keegstra first brought an unsuccessful

¹⁹¹ Canadian Human Rights Act RSC H-6 section 13(1) of 1985 (as amended).

¹⁹² In *Regina v Andrews and Smith* 3 SCR 870 (*supra*) the appellants' appeal was dismissed. After Cory JA examined the effects of hate literature and Canada's domestic and international commitments as background to his analysis under section 1 of the Canadian Charter, he found that section 319(2) of the Criminal Code met all the hurdles of section 1 as a reasonable and demonstrably justified limitation on section 2(b) of the Charter. Cory also stated that the Charter has embraced the richness, depth and vibrance of Canadian society through section 27 and constitutionalised its importance. He found that section 27 gives a clear direction of how section 1 is to be applied in respect of laws that wilfully promote hatred against an identifiable group so that appropriate laws that protect multiculturalism become reasonable limits upon free expression. This view was supported by Grange JA who found that section 27 can only reinforce the view that section 2(b) of the Canadian Charter does not protect hate propaganda. In *Canada (Canadian Human Rights Commission) v Taylor* 3 SCR 892 (*supra*) Taylor's actions were found to fall within the ambit of section 2(b) of the Canadian Charter. Dickson CJ held that section 13(1) of the Canadian Human Rights Act was a reasonable limit under section 1 and that the pressing and substantial concern of section 13(1) was heightened under sections 15 and 27 of the Charter. Moreover, the right to freedom of expression was not severely abridged and the means of section 13(1) were rationally connected to the objective. McLachlin J in dissent ruled that the impugned provision was too broad and vague and included an unnecessary prohibition of defensible speech. The right to freedom of expression was not, therefore, impaired as minimally as possible. In applying section 1 of the Canadian Charter, McLachlin J also argued that section 27 should be given full consideration. Since hate propaganda undermines the harmonious relations among various racial, cultural and religious groups and erodes tolerance and open-mindedness, the multicultural values inherent in section 27 magnify the importance of the legislative objectives of section 13(1) of the Canadian Human Rights Act in combatting hate propaganda and its consequences.

motion for a judicial declaration that section 319(2) of the Criminal Code infringed the Canadian Charter.¹⁹³ The accused taught social studies courses to students in grades nine and twelve at Eckville High School from the early 1970s to 1982. Through evidence given by former students as well as from information obtained from students' notebooks and essays, it was determined that the accused taught anti-Semitic theories. Students were expected to take down what was conveyed by the accused in the classroom and were expected to study and reflect this information in the form of essays and in examinations. If students' answers contained the theories taught by the accused, they received excellent marks. If, however, they used additional sources of reference, students received poor grades. Keegstra was convicted by the trial court of the public, wilful promotion of group hatred.¹⁹⁴ The accused subsequently appealed to the Alberta Court of Appeal where the conviction was unanimously overturned. The Court of Appeal found that section 319(2) of the Criminal Code unjustifiably infringed upon the accused's freedom of expression guaranteed by section 2(b) of the Canadian Charter.¹⁹⁵ Kearns J found that although deliberate lies are not protected by section 2(b), innocently or negligently made statements do enjoy constitutional protection. Moving to the analysis under section 1 of the Canadian Charter, Kearns J conceded that while he accepted that section 319(2) of the Criminal Code had the valid legislative objective to prevent harm to the reputation and psychological well-being of target group members, he nevertheless found the provision unconstitutional because the injury was not serious enough to require the sanction of criminal law. In order to be constitutional, more than harm to reputation was required. Greater harm, such as proof of actual hatred engendered as a result of the impugned form of expression, was required. Kearns J did not deem sections 27 and 28 of the Canadian Charter to constitute possible justification of the hate propaganda provision of the Criminal Code under section 1 of the Charter. The decision of the Court of Appeal was subsequently taken on appeal to the Supreme Court of Canada.

4 4 3 The Decision of the Supreme Court

Dickson CJ delivered the majority opinion of the Supreme Court.¹⁹⁶ The first part of his judgment addressed the implications of section 319(2) of the Criminal Code in relation to section

¹⁹³ (1988) 60 Alta LR (2d) 1.

¹⁹⁴ (1984) 19 CCC (3d) 254 (Alta QB).

¹⁹⁵ (1988) 87 AR 177 (CA). The Court of Appeal did not, for want of proper notice to the Crown, entertain the accused's argument that section 319(3)(a) of the Criminal Code violated the presumption of innocence protected under section 11(d) of the Canadian Charter. Section 319(3)(a) affords a defence of "truth" to the wilful promotion of hatred but only where the accused proves the truth of the communicated statements on a balance of probabilities.

¹⁹⁶ La Forest J, Sopinka J and McLachlin J dissenting at 701 - 704 (*supra*).

2(b) of the Canadian Charter with a view to assess whether the aforementioned statutory prohibition of hate propaganda constitutes an infringement of the constitutional guarantee of freedom of expression.

4 4 4 The Supreme Court's Analysis under Section 2(b) of the Canadian Charter

To determine whether or not the prohibition of hate propaganda under section 319(2) of the Criminal Code violates section 2(b) of the Canadian Charter, Dickson CJ first examined the scope of the right to freedom of expression. He did so by assessing the underlying values which support the freedom of expression guarantee under the Charter.¹⁹⁷ Those values, he argued, are seeking and attaining the truth, encouraging and fostering participation in social and political decision making and cultivating diversity in the form of individual self-fulfilment and human flourishing.¹⁹⁸ After finding the scope of section 2(b) of the Charter to be both "large and liberal", Dickson CJ adopted a strict categorical test which would permit content-based restrictions of freedom of expression only where the expression is communicated in a physically violent form.¹⁹⁹ Whereas the Supreme Court ruled in *RWDSU v Dolphin Delivery Ltd*²⁰⁰ that the freedom of expression guarantee does not extend to acts of violence and threats of violence, the Chief Justice clarified this exception by ruling that only messages communicated *directly* through the medium of violence will be excluded from constitutional protection.²⁰¹ Thus, as long as an expressive activity conveys meaning, it finds protection under section 2(b) regardless of the content of the conveyed message or its meaning. Even threats of violence would therefore fall within the scope of the Charter's protection.²⁰² Consequently, the Canadian legislature may restrict expressive activity only when it does not intend to restrict the content of the activity. But even if the purpose is directed solely at the effect rather than the content of expression, Dickson CJ argued, section 2(b) can still be brought into play if the affected party can demonstrate that the activity in question supports rather than undermines the principles and values upon which

¹⁹⁷ See also par 4 3 3 and accompanying footnotes for an exposition of Sopinka J's methodology under the section 2(b) analysis in *Regina v Butler* (*supra*).

¹⁹⁸ At 727 (*supra*), citing *Irwin Toy Ltd v Québec (Procureur Général)* at 765 - 767 (*supra*).

¹⁹⁹ At 728 - 729 (*supra*).

²⁰⁰ [1986] 2 SCR 573 at 588.

²⁰¹ At 731 (*supra*). The minority of the Supreme Court maintained *per* McLachlin J at 826 - 827 (*supra*) that threats of violence fall outside the protection afforded under section 2(b) of the Charter.

²⁰² At 732 (*supra*).

freedom of expression is premised.²⁰³ In applying this categorical test to section 319(2) of the Criminal Code, Dickson CJ found that the statutory prohibition of the wilful promotion of group hatred did indeed infringe section 2(b) of the Canadian Charter. He argued that the hate propaganda provision was an attempt by Parliament to prohibit communication which conveys meaning. Dickson CJ made the point that competing values contained in other provisions of the Charter (such as, for example, the equality and multicultural provisions²⁰⁴ should not be employed to interpret the scope of section 2(b). Since it is inappropriate to limit freedom of expression on the grounds of a particular context, the preferable course would be to balance the various constitutional values and factors under the section 1 analysis instead. If the court was to balance these values within the first stage of the analysis, the court would not have the benefit of conducting a contextual assessment and the analysis would be overtly abstract as a result.²⁰⁵ Dickson CJ thus argued that section 1 of the Charter is the preferable place to balance competing constitutional values because the section constitutes both a guarantee and a limitation of rights and freedoms.²⁰⁶ Section 1 would therefore permit a contextual analysis that fully weighs freedom of expression as a fundamental constitutional value with the possible harm that hate speech could inflict on the various groups identified in section 319(2) of the Criminal Code.²⁰⁷

4 4 5 The Supreme Court's Analysis under Section 1 of the Canadian Charter

Having determined that the public, wilful promotion of group hatred as a category of expression falls within the protection afforded by section 2(b) of the Canadian Charter and that section 319(2) of the Criminal Code infringes the accused's right to freedom of expression, Dickson CJ turned to consider whether this infringement was reasonable and demonstrably justifiable in a free and democratic society. The Supreme Court split four to three in finding that the burden of section 1 of the Charter was satisfied²⁰⁸ and that section 319(2) of the Criminal Code should be upheld as a reasonable and demonstrably justifiable limitation on freedom of expression. In light of my comprehensive exposition in *Regina v Butler* of how the Canadian Supreme Court

²⁰³ At 762 (*supra*).

²⁰⁴ Sections 15 and 27 respectively of the Constitution Act of 1982 Part I (*supra*). See also par 4 1 n 6 and par 4 4 and accompanying footnotes (*supra*).

²⁰⁵ At 764 - 770 (*supra*).

²⁰⁶ Section 1 of the Canadian Charter expressly states that it both guarantees and limits the rights and freedoms set out in the Charter: see par 4 3 4 1 (*supra*).

²⁰⁷ For the full text of section 319 of the Criminal Code, see par 4 4 1 n 190 (*supra*).

²⁰⁸ For a discussion of the functions of and foundation test for section 1 of the Canadian Charter, see par 4 3 4 1 and accompanying footnotes (*supra*).

assessed section 1 of the Canadian Charter, I intend to restrict my discussion of the court's analysis in the present instance to only two aspects of the enquiry. These two aspects respectively relate to an assessment of pressing and substantial objectives and the proportionality requirement.

4 4 5 1 Pressing and Substantial Objectives

The Supreme Court found that the impugned provision of the Criminal Code related to pressing and substantial concerns on two grounds. Since the first focussed on the harm caused by hate propaganda, Dickson CJ stressed that extremist hate speech is not merely offensive but indeed causes "real" and "grave" harm to both its target groups and society at large. Similar to sexual harassment, hate propaganda constitutes a serious attack on psychological and emotional health, for members of the target groups are humiliated and degraded, their self-worth is undermined and they are encouraged to withdraw from the community and deny their own personal identity. The majority of the court explained:

"Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred."²⁰⁹

By arguing that hate propaganda causes serious discord between cultural groups and creates an atmosphere conducive to discrimination and violence, the majority of the Supreme Court rejected the notion of harm employed by the Supreme Court of the United States. Dickson CJ expressly stated that the long established United States conception of harm - which requires that a "clear and present danger" must exist before expression may be restricted²¹⁰ - may be inappropriate to Canadian constitutional law.²¹¹ The court agreed that the analytical techniques employed by United States courts which effectively predetermine whether (and under what circumstances) expression may be limited, should not be imported into Canadian law.²¹² A second (related)

²⁰⁹ At 748 - 749 (*supra*).

²¹⁰ See *Abrams v United States* 250 US 616 (1919); *Schenck v United States* 249 US 47 (1919); *Debs v United States* 249 US 211 (1919); *Frohwerk v United States* 249 US 204 (1919); *Gitlow v New York* 264 US 652 (1927); and *Whitney v California* 274 US 357 (1927). For a critical assessment of the particular conception of harm employed by United States courts, see Chapter 3 of this dissertation par 3 3 2 and par 3 4 4 and accompanying footnotes (*supra*).

²¹¹ At 743 (*supra*).

²¹² At 740 - 744 (*supra*).

ground on which section 319(2) of the Criminal Code was found to be of pressing and substantial concern was the importance of the Canadian commitment to equality and multiculturalism reflected in sections 15 and 27 of the Charter. Dickson CJ situated section 27 in an equality context and argued that attacks on racial, ethnic or religious groups need to be prevented because group discrimination can adversely affect its individual members.²¹³ According to the Supreme Court, by restricting hate propaganda, Parliament seeks "to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons."²¹⁴ The Chief Justice cautioned that even though current United States free speech doctrine may be helpful in many respects, it was doubtful whether it could be applied in the present context. To further emphasise the point that the prohibition of hate propaganda relates to pressing and substantial concerns, the Supreme Court took note of international human rights obligations that require Canada to suppress hate propaganda in order to protect vulnerable groups.²¹⁵ The court said that when values such as equality and freedom from racism enjoy status as international human rights, these values are generally ascribed to a high degree of importance under section 1 of the Canadian Charter.²¹⁶

4 4 5 2 Proportionality

Dickson CJ again referred to the harm engendered by hate propaganda in applying the proportionality test under section 1 of the Canadian Charter. The Supreme Court made the point that hate propaganda is only tenuously connected to the values which underlie section 2(b) of the Canadian Charter because the harm of hate speech is significant and the truth marginal.²¹⁷ In assessing hate propaganda against the fundamental values which underpin the constitutional guarantee of freedom of expression, Dickson CJ found it to be an illegitimate form of political speech that loses its democratic aspirations to the free speech guarantee because the ideas it propagates are anathema to democratic values. Moreover, hate speech undermines the value of protecting and fostering a vibrant democracy because it denies citizens equality and meaningful

²¹³ At 746 (*supra*).

²¹⁴ At 756 (*supra*). Dickson CJ's reasoning is not dissimilar to that of the United States Supreme Court in *Beauharnais v The State of Illinois* 343 US 250 (1952). But compare *Anti-defamation League of B'nai B'rith v FCC* 403 F2d 169 (DC Cir) (1968) at 174 and *Collin v Smith* 587 F2d 1197 (7th Cir) (1978) at 1204 - 1205.

²¹⁵ See article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966. It entered into force in Canada on January 4, 1969 by virtue of the Canada Treaty Series No 28 of 1970. The United States has not ratified this or other similar conventions.

²¹⁶ At 750 (*supra*), citing *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1056.

²¹⁷ At 761 (*supra*).

participation in the political process and its contribution to self-fulfilment and human flourishing is negligible. Hate speech not only denies freedom of expression to those it targets, but also undercuts the self-development and human flourishing among all members of society by engendering intolerance and prejudice.²¹⁸

Finally, the Supreme Court examined the relationship between the right to equality in the Charter and the guarantee of freedom of expression. While acknowledging that section 15 of the Charter does not itself guarantee social equality, the court nevertheless made it clear that the constitutional guarantee of equality is both a means to an equal society as well as an end in itself. Dickson CJ's statement that "the principles underlying section 15 of the Charter are ... integral to the section 1 analysis" requires section 15 to have a broader constitutional function than the protection of individuals from state-imposed discrimination.²¹⁹ The Supreme Court clearly established that just as Charter rights can be used to challenge legislation, they can also be used to uphold existing legislation that support the values of the equality clause under the Charter. In the words of Dickson CJ, "[i]nsofar as it indicates our society's dedication to promoting equality, section 15 is also relevant in assessing the aims of section 319(2) of the Criminal Code under section 1."²²⁰ The court cited with approval the written submission of the Women's Legal Education and Action Fund (LEAF) in which it argued that

"[g]overnment sponsored hatred on group grounds would violate section 15 of the Charter. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the Charter, deserves special constitutional consideration under section 15."²²¹

Therefore, insofar as section 15 indicates Canada's dedication to promote equality, it was relevant in assessing both the constitutionality and objectives of section 319(2) of the Criminal Code. Similarly, the court took account of section 27 and its recognition that Canada is a multicultural society in which the diversity and richness of various cultural groups is a value to

²¹⁸ At 763 - 765 (*supra*). The minority of the Supreme Court *per* McLachlin J was of the opinion at 859 (*supra*) that some hate propaganda could be of democratic importance. The prohibition of hate propaganda may initiate a "slippery slope" of encroachment on valuable political speech or could target the speech of members of disadvantaged minority groups against dominant majorities. Dickson CJ was however of the view at 774 - 776 (*supra*) that the *mens rea* requirement of section 319(3) of the Criminal Code would restrict the reach of the provision to those groups meant to be caught by it. See also par 4 4 7 (*infra*).

²¹⁹ At 756 (*supra*).

²²⁰ At 755 (*supra*).

²²¹ At 755 (*supra*).

be protected and enhanced.²²² Thus the equality and multicultural clauses read with the hate propaganda provisions of the Criminal Code within the context of section 1 of the Charter were sufficient to outweigh the right to freedom of expression. The Supreme Court thus concluded that although section 319(2) of the Criminal Code violates the guarantee of freedom of expression under section 2(b) of the Canadian Charter, it nevertheless constitutes a reasonable and demonstrably justified limitation under section 1 in light of the Charter's commitment to equality and the multicultural heritage of Canadians.

4 4 6 A Critical Assessment of the Approach of the Supreme Court of Canada on Hate Propaganda in *Regina v Keegstra*

It has become evident from my discussion of the Supreme Court's decision in *Regina v Keegstra* that the court developed an equality-centred harm-based rationale to justify the regulation of hate speech under Canadian law. The manner in which the Supreme Court balanced and assessed competing constitutional values, institutional arrangements and human relations point the way to a more inclusive, democratic and egalitarian conception of society which steers away from an individual-centred understanding of freedom. The approach favoured by the Canadian Supreme Court seems more aware of the actual impact of speech on the historically marginalised or disadvantaged groups in society than has been articulated in United States First Amendment jurisprudence which, I pointed out in the preceding chapter,²²³ weighs the competing claims of individuals as though they were equal and ignores the social realities in which these claims operate.²²⁴ This awareness is particularly evident in the second part of the Supreme Court's enquiry where it assessed whether section 319(2) of the Criminal Code constitutes a reasonable and demonstrably justifiable limitation on the right to freedom of expression which is guaranteed under section 2(b) of the Canadian Charter. To this effect, the Supreme Court had to establish a suitable conception of harm, determine which constitutional values underscore the legislative objective of section 319(2) as a pressing and substantial concern and formulate a strategy to distinguish extremist hate propaganda from political speech.

The majority of the Supreme Court outrightly rejected the notion that a clear and present danger

²²² See par 4 4 (*supra*).

²²³ See Chapter 3 of this dissertation par 3 4 1 - par 4 3 2 and accompanying footnotes (*supra*).

²²⁴ See, for example, *Doe v University of Michigan* 721 F Supp 852 (ED Mich) (1989) and Penelope Seator "Judicial Difference to Pornography's Harm: *American Booksellers v Hudnut*" 1987 17 *Golden Gate University Law Review* 297.

must exist before expression can be construed as harmful.²²⁵ The rejection of United States First Amendment law on this point is to be welcomed. In recognising that serious harms which need to be addressed by criminal law do not in general entail such an identifiable danger point or necessarily lend themselves to a "clear and present danger" type of classification, the Supreme Court understood that the harms caused by hate propaganda are often difficult to detect because its effects may be subtle. The humiliation and degradation which hate propaganda gives rise to indeed impact on a psychological and emotional level. Hate propaganda relies on fear, intimidation and ignorance to engender indoctrination over time. And since indoctrination works through the process of socialization, any requirement to prove a "clear and present danger" is likely to render a hate speech provision unenforceable. It is also to be welcomed that the majority of the Supreme Court recognised that the Canadian Charter is not constrained by the textual or political constitutional imperatives of the First Amendment to the United States Constitution and that circumstantial differences between the two constitutions require a distinctly Canadian approach. Although both countries share a democratic ideal, they do not share a common view of social and political life. In sociological terms, Canada and the United States experience some of the same realities in respect of heterogeneity of population, language differences and an indigenous population.²²⁶ Within this context, the recognition of minority rights has been central to civil libertarian politics in both countries. But a major ideological difference exists in respect of Canada where the object of the drafters of the Charter of Rights and Freedoms was to develop a bilingual, multicultural and pluralistic legal and constitutional order.²²⁷ It is noteworthy that the Supreme Court employed the commitment to equality and multiculturalism reflected in sections 15 and 27 of the Canadian Charter to assess whether section 319(2) of the Criminal Code constitutes a pressing and substantial concern within the context of section 1 of the Charter. By situating section 27 in an equality context, the Supreme Court argued that attacks on racial, ethnic or religious groups need to be prevented because group discrimination can adversely affect its individual members.²²⁸ The Supreme Court therefore found that section 319(2) seeks to "bolster the notion of mutual respect necessary in a nation which venerates the *equality of all*

²²⁵ At 743 (*supra*).

²²⁶ See, in general, Alan Westin "The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis" in W McKeacher (ed) *The US Bill of Rights and the Canadian Charter of Rights* (1983) 27.

²²⁷ This is evident from the minutes of a session of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada which state that the purpose of a multicultural provision in a future Canadian Constitution would be "[t]o develop Canada as a bilingual and multicultural country in which all its citizens, male and female, young and old, native peoples and Métis, and all groups from ethnic origins feel equally at home": see *Final Report of the Special Joint Committee of Senate and House of Commons* (1972) (Queen's Printer, Ottawa).

²²⁸ At 746 (*supra*).

persons.”²²⁹ The Supreme Court clearly views commitments under the Canadian Charter to be different in many respects from the commitments of the Bill of Rights of the United States Constitution. The multicultural section is a case in point. When read with section 15 of the Charter, a formidable obstacle is created against racist or sexist propaganda.²³⁰ Another unique feature of the Canadian Charter is that it expressly protects the interests of minorities. To this end, language and education rights,²³¹ aboriginal rights²³² and the rights of denominational, separate or dissentient schools²³³ are entrenched. This underscores the strong commitment to collective rights under the Charter that is not evident from the Constitution of the United States. Moreover, whereas Canada recognises and seeks to comply with its human rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, the United States has elected not to ratify this or any similar conventions.²³⁴ Viewed against this background, the Canadian Supreme Court had little difficulty in finding that the prohibition of the public, wilful promotion of group hatred is a pressing and substantial concern sufficient to meet the requirements of section 1 of the Canadian Charter.

In its strategy to distinguish extremist hate propaganda from political speech, the Supreme Court likewise drew on the values of equality and multiculturalism. The majority of the court found that hate propaganda undermines democratic values in that it denies citizens meaningful participation in the political process. Since hate speech is only tenuously connected to the values which underpin freedom of expression, its contribution to self-fulfilment and human flourishing

²²⁹ At 756 (*supra*). My emphasis.

²³⁰ Obviously, section 27 of the Canadian Charter cannot be employed to the same effect in relation to hate speech pornography. While the majority of the Supreme Court used the multicultural provision of the Charter to underscore both its finding that section 319(2) of the Criminal Code constitutes a pressing and substantial objective and to satisfy the proportionality test under section 1 of the Charter, an argument against hate speech pornography on the basis that it is not protected under section 2(b) of the Charter by virtue of section 27 is likely to be unconvincing. It will be difficult to relate the notion of multiculturalism to women, since women do not constitute an “identifiable cultural group” as contemplated by Dickson CJ. Consequently, an argument against hate speech pornography which relies on section 27 of the Canadian Charter would at best only target pornography which carries a violent, racist, ethnic or religious propagandistic message. Section 27 would therefore simply serve to further restrict an already limited constitutional argument against adult heterosexual pornography.

²³¹ See sections 21 and 23 of the Constitution Act of 1982 Part I (*supra*).

²³² See sections 25 and 35 of the Constitution Act of 1982 Part I (*supra*).

²³³ See section 29 of the Constitution Act of 1982 Part I (*supra*).

²³⁴ This Convention entered into force in Canada by virtue of the Canada Treaty Series No 28 of 1970.

was found to be negligible. The majority therefore concluded that hate propaganda denies freedom of expression to those it targets and undercuts the self-development and human flourishing of all members of society by engendering intolerance and prejudice.²³⁵ The minority of the Supreme Court maintained, however, that some hate propaganda could have value and accordingly argued that if the guarantee of freedom of expression is to be meaningful, it must protect expression which challenges even the very basic conceptions of Canadian society. It may therefore prove difficult to draw the line between speech which has value to democratic or social issues and speech which has no such value. The minority argued that attempts to confine the guarantee of freedom of expression only to speech which is judged to possess redeeming value strike at the very essence of the value of freedom in that it reduces the realm of protected expression to "that which is comfortable and compatible with current conceptions."²³⁶ Moreover, a prohibition of hate propaganda could set a "slippery slope" of encroachment of valuable political speech in motion or could catch the angry speech of members of disadvantaged minority groups against dominant majorities. I think the difference of opinion on the possible constitutional value of hate speech stems in part from the Supreme Court's reliance on the equality provision of the Canadian Charter in its assessment of the issue. It is established in Canadian constitutional law that section 15 is conceived as a means to protect groups that suffer historical, social, political and legal disadvantage.²³⁷ By linking section 319(2) of the Criminal Code to the equality safeguard of the Charter, the Supreme Court found that the prohibition on hate propaganda complies with the requirements of section 1. Section 319(2) thus passes as a reasonable and demonstrably justifiable limitation on hate speech because it targets speech against a historically marginalised (religious) group. It follows therefore, that the hate speech in question must be related to the perpetuation of some equality-related disadvantage in order for the proportionality test under section 1 of the Canadian Charter to be satisfied. As a consequence, historically or socially dominant groups would presumably not have recourse to section 319(2) of the Criminal Code. Since these groups suffer no tangible historical or political disadvantage, the Supreme Court's equality rationale would not deem the prohibition of hate propaganda as a justifiable limitation on freedom of expression. The potential victims of hate propaganda are not, however, only those who belong to historically marginalised or disadvantaged groups. Even affluent members of society, including celebrities or politicians stand in need of protection against hate speech. By stressing the remedial component of the equality provision of the Canadian Charter, the possible victims of hate speech are thus inevitably restricted to racial, ethnic or religious groups. The extent to which the Supreme Court's understanding of hate propaganda can be employed in an analysis of adult heterosexual

²³⁵ At 763 - 765 (*supra*).

²³⁶ At 859 (*supra*).

²³⁷ *Per* Wilson J in *Regina v Turpin* [1989] 1 SCR 1296 at 1333. See also *Andrews v The Law Society of British Columbia* [1989] 1 SCR 143.

pornography within the context of the South African Constitution will be assessed in the next paragraph.

4 4 7 The Possible Value of the Canadian Approach to Hate Propaganda in respect of Adult Heterosexual Pornography and the South African Constitution

Although I argued above²³⁸ that one must guard against restricting the rationale for the prohibition of hate speech to historically marginalised or disadvantaged groups, the equality based framework employed by the Supreme Court of Canada in respect of freedom of expression could facilitate a strong gender-specific constitutional argument against adult heterosexual pornography. In light of the framework established in *Regina v Keegstra*, it becomes possible to formulate a constitutional argument against a particular category of adult heterosexual pornography. Since some adult heterosexual pornography is made through the use of force, violence or coercion, it could be argued that this category of pornography constitutes the public, wilful promotion of hatred against women which would not pass constitutional scrutiny. Sopinka J found in *Regina v Butler* that explicit sex coupled with violence constitutes a category of expression which enjoys protection under section 2(b) of the Canadian Charter.²³⁹ But the Supreme Court failed to specify or consider whether pornography made through the use of force, violence or coercion could be construed as a hateful mode of expression which, on the basis of the generous interpretation afforded to section 2(b),²⁴⁰ cannot be excluded on the basis of its content or meaning from protection under the Charter. In *Regina v Keegstra* the Supreme Court did, however, provide clarity on whether actual or threats of violence would enjoy constitutional protection. The majority of the court found that since there was no direct or threatened physical violence in the anti-Semitic message, it will enjoy protection under section 2(b) of the Charter as long as the message conveys meaning.²⁴¹ The minority of the Supreme Court disagreed with the majority on this point and held that violence or threats of violence are excluded from constitutional protection. But since the anti-Semitic message in the present instance was not conveyed in a violent manner, the minority likewise proceeded to consider whether section 319(2) of the Criminal Code constitutes a justifiable limitation on section 2(b) of the Canadian Charter.

²³⁸ See par 4 4 6 and accompanying footnotes (*supra*).

²³⁹ At 470 (*supra*).

²⁴⁰ At 473 - 474 (*supra*) and *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (supra)*.

²⁴¹ At 732 (*supra*).

I would like to draw on the contention by the minority of the Supreme Court and argue that once it has been established that violence or threats of violence do not constitute modes of expression which enjoy protection under section 2(b) of the Canadian Charter, it becomes unnecessary to proceed with a section 1 analysis. Therefore, whereas the Supreme Court opted to balance the various constitutional values at play under the limitation clause, the court ought to come to a different conclusion when called upon to evaluate hate speech pornography under section 2(b) of the Canadian Charter. While hate propaganda and pornography are similar in their express or implied intent - which is to distort the image of a group or class of people, to deny their humanity and to make them objects of ridicule and humiliation - a fundamental difference exists in respect of the *method* used to achieve the desired results. In hate speech pornography, coercion, degradation and assault constitute its subject. Adult heterosexual pornography which is made through the use or threat of force or infliction of pain constitutes a more serious and immediate harm to women than the notion of harm identified by the majority of the Supreme Court in *Regina v Keegstra*. One could therefore argue that hate speech pornography is constitutionally unacceptable not primarily by virtue of its meaning, but because of the direct harm that it causes. It will prove very difficult to argue that pornography produced through the use of violence, force or coercion meets any of the values that underlie the constitutional recognition of freedom of expression. Hate speech pornography is far removed from the values of "fostering a vibrant and creative society", "vigorous and open debate essential to democratic politics and the preservation of the rights and freedoms of Canadians" and "a society which fosters the self-actualisation and freedom of its members."²⁴² The minority of the Supreme Court thus rightly argued that violence or threats thereof must be excluded from the protection afforded by section 2(b) of the Canadian Charter. At the very least, actual or threatened violence against women removes their choices and undermines their freedom of action. And since actual or threatened physical violence are inimical to the values which underpin a free and democratic order, violence also threatens the very basis upon which all (constitutional) freedoms are established. A suitable value judgment can therefore be made in respect of freedom of expression as constitutional value and the particular harm of hate speech pornography without reference to section 1 of the Canadian Charter.

This course of action may not, however, prove possible in respect of the South African constitutional dispensation. A fundamental difference exists in respect of the Canadian and South African constitutional experiences in respect of hate speech. Unlike the Canadian Charter of Rights and Freedoms, the Bill of Rights in the South African Constitution²⁴³ contains a specific reference to hate speech. Section 16(2)(c) of the South African Constitution contains a specific, internal limitation on freedom of expression. This subsection provides that the right

²⁴² At 763 - 765 (*supra*).

²⁴³ Act 108 of 1996.

to freedom of expression does not extend to the "advocacy of hatred that is based on race, ethnicity, *gender* or religion, and that constitutes incitement to cause harm."²⁴⁴ In addition to this internal limitation, the South African Constitution also contains a general limitation clause.²⁴⁵ Since section 36 applies to all the rights in the Bill of Rights,²⁴⁶ it may follow that section 16(2)(c) also has to satisfy the general provisions of the limitations clause.²⁴⁷ As in Canada, the South African legislature has also enacted a statutory provision which prohibits the advocacy of "war, violence and hatred."²⁴⁸ The Films and Publications Act prohibits the distribution, broadcast, exhibition or presentation²⁴⁹ of a publication,²⁵⁰ film²⁵¹ or play²⁵² which advocates war, violence and hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm. Therefore, in light of the specific internal prohibition of hate propaganda as well as the general limitation clause contained in the Bill of Rights in the South African Constitution, an assessment of the constitutionality of hate speech pornography in South African law may have to proceed beyond an assessment of whether or not this type of pornography in itself constitutes an unconstitutional mode of expression. Whether hate speech pornography will indeed meet the stringent requirements of section 16(2)(c) of the South African Constitution or section 29 of the Films and Publications Act remains to be seen. Both sections not merely require that hatred be advocated on the basis of gender, but in addition require that *incitement to cause harm* must also be shown. But as I suggested in Chapter 1 of this dissertation, the question whether pornography which is made through the use (or threat) of force or infliction of pain advocates gender hatred that constitutes incitement to cause harm will be

²⁴⁴ See section 16(2)(c) of Act 108 of 1996 (*supra*). My emphasis.

²⁴⁵ See section 36 of Act 108 of 1996 (*supra*). See also par 4.1.6 (*supra*).

²⁴⁶ Section 36(1) of Act 108 of 1996 (*supra*) does not make an exception of any right entrenched under the South African Bill of Rights, for it provides that "[t]he rights in the Bill of Rights may be limited ..." in accordance with the requirements set out in section 36(1)(a) - (e) and section 36(2) of the South African Constitution.

²⁴⁷ See Gerhard Erasmus "Limitation and Suspension" in D van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (1996) 629 at 639. For a discussion of the relationship between section 16(2)(c) and section 36 of Act 108 of 1996 (*supra*), see Chapter 6 of this dissertation par 6.6.5 and accompanying footnotes (*infra*).

²⁴⁸ See the Films and Publications Act 65 of 1996.

²⁴⁹ See section 29 of Act 65 of 1996 (*supra*).

²⁵⁰ See section 29(1) of Act 65 of 1996 (*supra*).

²⁵¹ See section 29(2) of Act 65 of 1996 (*supra*).

²⁵² See section 29(3) of Act 65 of 1996 (*supra*).

explored in Chapter 6 as an alternative constitutional argument against adult heterosexual pornography.

4 5 CONCLUDING OBSERVATIONS

I argued in this chapter that the jurisprudence of the Supreme Court of Canada in respect of pornography and hate propaganda is eminently better suited to provide an assessment of the constitutional implications of adult heterosexual pornography within the ambit of the Bill of Rights in the South African Constitution than the First Amendment obscenity jurisprudence of the Supreme Court of the United States. My comparative analysis of Canadian and United States law has revealed that fundamental differences exist in the level of protection granted to freedom of expression in relation to other constitutional values and interests. This in part arises from the distinct political, social, historical and constitutional contexts of the two countries.

In his review of Canadian constitutional jurisprudence, Kent Greenawalt concludes that Canada has benefited from the United States experience. When he compared the approach of the Canadian and United States judiciary in balancing community values and individual rights, he conceded that "[i]t is hard not to be attracted by the flexible and intelligent evaluation of the Canadian Supreme Court that seems to be much more sensible than the categorical boxes and blindness to nuances of dominant American approaches."²⁵³ This is a sentiment to which I also subscribe. Although the (political) history and social make-up of Canada and South Africa are different, the bills of rights in our constitutions largely suggest that our legal and political approaches, aspirations and ideals are similar. South African constitutional jurisprudence can therefore only profit from the successes (as well as mistakes) of Canadian courts on matters relating to equality, pornography and hate speech.

It is against this backdrop that I shall accordingly proceed with a critical assessment of South African obscenity law and the approach adopted by the South African Constitutional Court in respect of sexually explicit material in the quest for a legal definition (and suitable conception of harm) of adult heterosexual pornography.

253

See *Fighting Words: Individuals, Communities and Liberties of Speech* (1995) (Princeton: University Press) as quoted by John Sopinka "Should Speech that Causes Harm be Free?" in J Duncan (ed) *Between Speech and Silence* 128 at 148 (*supra*).

CHAPTER 5

TOWARD A LEGAL DEFINITION OF ADULT HETEROSEXUAL PORNOGRAPHY AND A CONCEPTION OF HARM FOR SOUTH AFRICAN CONSTITUTIONAL JURISPRUDENCE

| | PAGE |
|--|------|
| 5 1 INTRODUCTION | 195 |
| 5 2 A HISTORICAL OVERVIEW OF PORNOGRAPHY UNDER SOUTH AFRICAN LAW | 196 |
| 5 2 1 The Position under Common Law and Pre-Union South African Law | 196 |
| 5 2 2 South African Obscenity Law after 1910 | 200 |
| 5 2 3 The Publications and Entertainments Act of 1963 | 203 |
| 5 2 4 The Stand-off between the Publications Control Board and Public Opinion | 209 |
| 5 2 5 The Kruger Commission Report and the New Publications Act of 1974 | 210 |
| 5 3 TOWARDS A NEW STATUTORY LANDSCAPE FOR THE REGULATION OF FILMS AND PUBLICATIONS IN SOUTH AFRICAN LAW | 216 |
| 5 3 1 The Drafting of a New Films and Publications Bill for South Africa | 216 |
| 5 3 2 A Southern African Perspective on Incitement to Hatred | 220 |
| 5 3 3 The New Films and Publications Act of 1996 | 230 |
| 5 3 3 1 A New System of Classification | 231 |
| 5 3 3 2 The Impact of the Films and Publications Act | 233 |
| 5 3 3 3 The Criminalisation of Hate Speech in South Africa's Age of Constitutionalism | 234 |
| 5 4 THE CONSTITUTIONAL IMPLICATIONS OF INDECENCY, OBSCENITY AND OFFENSIVENESS: <i>CASE; CURTIS V MINISTER OF SAFETY AND SECURITY</i> | 236 |
| 5 4 1 The Facts in <i>Case; Curtis v Minister of Safety and Security</i> | 236 |
| 5 4 2 The Decision of the South African Constitutional Court | 237 |

| | | |
|----------------|--|-----|
| 5 4 3 | A Critical Assessment of the Decision of the South African Constitutional Court in <i>Case; Curtis v Minister of Safety and Security</i> | 243 |
| 5 4 3 1 | The Right to Privacy as Constitutional Priority | 244 |
| 5 4 3 2 | The Constitutional Court's Conception of Pornography | 246 |
| 5 4 3 3 | Traces of Ambivalence in the Constitutional Court's Assessment of Pornography | 247 |
| 5 5 | A SUITABLE CONCEPTION OF HARM AND LEGAL DEFINITION OF ADULT HETEROSEXUAL PORNOGRAPHY FOR SOUTH AFRICAN (CONSTITUTIONAL) LAW | 248 |
| 5 5 1 | A Suitable Conception of Harm of Adult Heterosexual Pornography | 248 |
| 5 5 2 | A Legal Definition of Adult Heterosexual Pornography for South African Law | 249 |
| 5 6 | CONCLUDING OBSERVATIONS | 253 |

CHAPTER 5

TOWARD A LEGAL DEFINITION OF ADULT HETEROSEXUAL PORNOGRAPHY AND A CONCEPTION OF HARM FOR SOUTH AFRICAN CONSTITUTIONAL JURISPRUDENCE

"What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State."¹

"While I agree that one's right to privacy should be respected, ... [t]here seems to be considerable consensus, both here and abroad, that some forms of pornography and obscene matter should not enjoy constitutional protection ... [h]owever, possession by adults, in the privacy of their homes for personal viewing of sexually explicit erotica, ... may not be prohibited, for the benefit of those who derive pleasure in viewing such material."²

"[V]irtually all liberal legal theory presumes the validity of the distinction between public and private: the 'role of law [is] to mark and guard the line between the sphere of social power, organized in the form of the state, and the area of private right.' On this basis, courts distinguish between obscenity in public (which can be regulated, even if some attempts founder, seemingly in part because the presentations are public) and the private possession of obscenity in the home. *The problem is that not only the public but also the private is a sphere of social power, of sexism. On paper and in life pornography is thrust upon unwilling women in their homes. The distinction between public and private does not cut the same for women as for men. It is men's right to inflict pornography upon women in private that is protected.*"³

5.1 INTRODUCTION

This chapter is the last in a trilogy which seeks to evaluate the different conceptions of pornography in the United States, Canada and South Africa with a view to formulate a (legal) definition of adult heterosexual pornography for South African law. Whereas the previous two chapters of this dissertation involved a critical assessment of the different approaches favoured by United States and Canadian courts in respect of sexually explicit material, the present chapter will focus on how the South African legislature and courts (including the Constitutional Court) have endeavoured to meet the various social, political and legal challenges presented by adult heterosexual pornography. In light of the fundamental changes which the South African legal

¹ Didcott J in *Case, Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (CC) at 647.

² Madala J at 651 (*supra*).

³ Catharine MacKinnon "Not a Moral Issue" in *Feminism Unmodified: Discourses on Life and Law* (1987) 146 at 155, quoting Thomas Emerson *Toward a General Theory of the First Amendment* (1966) at 28 (hereinafter referred to as *Feminism Unmodified*). My emphasis.

and political landscape underwent since 1994, I shall first embark in this chapter on a historical overview of the treatment of pornography in South African law. To this end, I shall consider South African common law and pre-Union attempts to proscribe sexually explicit publications,⁴ thereafter discuss the regulation of indecent or obscene material during the period 1910 to 1993⁵ and conclude with an assessment of the measures introduced by the South African legislature to address the specific difficulties raised in a constitutional democracy by sexually explicit material⁶ and speech which incites racial or gender hatred.⁷ Once this (historical) overview has been concluded, I shall embark on a critical assessment of the first - and to date only - decision of the South African Constitutional Court on the issue of pornography.⁸ The chapter will conclude with my proposal for a suitable conception of harm⁹ and a legal definition of adult heterosexual pornography¹⁰ in support of the two respective feminist arguments that I will hereafter¹¹ explore against pornography within the ambit of the Bill of Rights in the South African Constitution.

5 2 A HISTORICAL OVERVIEW OF PORNOGRAPHY UNDER SOUTH AFRICAN LAW

5 2 1 The Position under Common Law and Pre-Union South African Law

South African law enjoys a dual common law heritage.¹² By virtue of the establishment of a refreshment station by the Dutch *Vereenigde Geocroyeerde Oost-Indische Compagnie* (VOC) at the Cape of Good Hope in 1652¹³ and the first British occupation of the Cape in 1795,¹⁴ both

⁴ See par 5 2 1 and accompanying footnotes (*infra*).

⁵ See par 5 2 2 - 5 2 5 and accompanying footnotes (*infra*).

⁶ See par 5 3 1 and 5 3 3, especially par 5 3 3 1 - 5 3 3 2 and accompanying footnotes (*infra*).

⁷ See par 5 3 2 and 5 3 3 3 and accompanying footnotes (*infra*).

⁸ See par 5 4 and accompanying footnotes (*infra*).

⁹ See par 5 5 1 and accompanying footnotes (*infra*).

¹⁰ See par 5 5 2 and accompanying footnotes (*infra*).

¹¹ See Chapter 6 of this dissertation and accompanying footnotes (*infra*).

¹² For a comprehensive account of the development of common law in South Africa, see "Sources of South African Law" in WJ Hosten et al *Introduction to South African Law and Legal Theory* (1997) 376 at 520 - 533.

¹³ The Dutch occupation of the Cape of Good Hope occurred at a time when the Dutch Republic was the leading mercantile nation of Europe. The Cape remained under Dutch rule for a period of one hundred and forty three years

Roman Dutch and English law have been received into South African law. Yet no direct measures for the restriction of sexually explicit material are to be found in Roman Dutch law. Some Roman Dutch writers did, however, refer to the crime of public indecency and it would appear that certain forms of public indecency could possibly have been punishable as different offences, such as the vague *crimina extraordinaria*. Johannes Voet, for example, made reference to certain conduct that would constitute public indecency under Roman Dutch law, notably the violation of the marriage of another by the casting of a reflection on the chastity of a man's wife.¹⁵ But English law played a far more significant role in this regard. In the first reported case on public indecency,¹⁶ Lord De Villiers indeed argued that the South African crime of public indecency is derived from English law and thus concluded that the matter should be guided by English precedent.¹⁷

The Supreme Court of Natal was the first to link public indecency to the publication of obscene literature.¹⁸ In *Rex v Hardy*¹⁹ the accused (one George Webb Hardy) was convicted and sentenced to two months in jail on the charge that he had published an "indecent, lewd, scandalous and offensive article or writing" entitled *The Black Peril*²⁰ which described acts of sexual conduct between black men and white women. The article in question appeared in a Durban newspaper, *The Prince*, of which Hardy was the editor, publisher and printer. Indicative of the strong racial undercurrent which had long existed in South African legal and political society, the Supreme Court maintained that the article "was productive of and to the public

until 1795.

¹⁴ In June 1795, Great Britain - fearing that the French Republic would seize the Cape - landed a small task force at Simon's Bay. The first British occupation of the Cape came to an end in 1803 when the British handed over the castle at the Cape to the representatives of the Batavian Republic. The Batavian *régime* administered the Cape until the second British occupation in 1806 when Britain, fearing Napoleon Bonaparte's colonial ambitions, dispatched a powerful expeditionary force to seize the Cape as strategic trade post *en route* to India.

¹⁵ See *Commentarius ad Pandectas* (1698) at 47.11.1.

¹⁶ See *Regina v Marais* (1888) 6 SC 367.

¹⁷ At 370 (*supra*).

¹⁸ The Supreme Court of Natal was also the first to link public indecency to the publication of an "indecent" sketch in *Rex v Bungaroo* 1904 NLR 28 at 29 *per* Finmore ACJ.

¹⁹ (1905) 26 NLR 35 165.

²⁰ At 166 (*supra*).

mischievous and tending to the deprivation of the morals of the people of Durban.”²¹ But the courts were - on the whole - reluctant to extend the principles of common law to clamp down on undesirable publications. The general assumption was that since this practice would lead to a watering down of the common law, legislative measures would be better suited to deal with obscene publications.²² Before the Union of South Africa was established in 1910,²³ statutory measures to address undesirable publications were introduced in the Cape, Natal and Transvaal. Initially, only publications that were imported into these respective regions were targeted. Of the three, the Cape Colony was the first to introduce legislation to prohibit the import, post and distribution of undesirable literature. The Customs Act of 1872,²⁴ *inter alia*, provided that no “indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engraving, or any other indecent or obscene articles, shall be imported or brought into this Colony.”²⁵ Oddly enough, the Customs Act did not make any provision for penalties. This situation continued for thirty four years until the Act was amended by the Customs Amendment and Tariff Act²⁶ to the effect that someone who imported or attempted to import indecent or obscene material or articles would be guilty of an offence and could face, upon conviction, a penalty of £ 50 and/or a jail term of three months.²⁷ In 1902, the Transvaal followed the example of its southern neighbour and incorporated the provisions of the Customs Act of 1872 almost *verbatim* into its own Customs Management Ordinance.²⁸ Again, no provision was made for penalties. The same provision, although in somewhat amended form, was also incorporated into the Natal Customs Consolidation and Shipping Act of 1899.²⁹ No similar legislation was adopted in the Orange Free State. These three Acts remained in force in the respective regions until 1913.³⁰

²¹ At 166 - 167 (*supra*).

²² See Pieter Geldenhuys “Sensuur in Suid Afrika: Tussen Faro en die Rooi See” in *Pornografie, Sensuur en Reg* (1977) 22.

²³ The Union of South Africa was established by virtue of an Act of the British Parliament: see the South Africa Act of 1909 (9 Edw VII c9).

²⁴ Act 10 of 1872. The Customs Act was an exact copy of the British Customs Consolidation Act 16 & 17 Vict (C) 107 of 1853.

²⁵ See section 14 of Act 10 of 1872 (*supra*). The publication of any of the aforementioned was subject to forfeiture.

²⁶ Act 1 of 1906.

²⁷ See section 22 of Act 1 of 1906 (*supra*).

²⁸ Ordinance 23 of 1902 (T).

²⁹ Act 13 of 1899 (N).

³⁰ See par 5.2.2 and accompanying footnotes (*infra*).

The Cape Colony was also the first to clamp down on local publications. The Obscene Publications Act of 1892 combatted undesirable local publications on two fronts.³¹ First, it incorporated the most significant provisions of the British Obscene Publications Act of 1857 into the Cape Colony.³² The British Act was primarily a preventative measure which extended and supplemented the common law by vesting a magistrate with the power to order the seizure and destruction of obscene material. This Act indeed formed the basis of the Crown's appeal in *Regina v Hicklin*³³ which I discussed in full in Chapter 3 of this dissertation.³⁴ But the Cape Act also went further than its British predecessor by providing that the occupant of the premises where the obscene material was found, the owner of the obscene publication, including the printer, photographer, producer, distributor and exhibitor would be guilty of an offence. The Act also made it an offence to distribute, sell or exhibit any obscene and indecent publication.³⁵ In the Transvaal, the publication of undesirable local material was regulated by the Criminal Law Amendment Act of 1909 whose provisions largely corresponded with those of the Cape Obscene Publications Act.³⁶ The only significant difference between the two was that the Criminal Law Amendment Act also declared the publication or distribution of any advertisement regarding contraceptives or preparations that procure abortions an offence.³⁷ The Orange Free State promulgated the Police Offences Ordinance in 1902³⁸ which declared it an offence to sell, distribute or exhibit any profane, indecent or obscene book, newspaper or any publication or copy, picture or other depiction.³⁹ The only provisions of importance in Natal were local ordinances which empowered authorities to prohibit the exhibition or sale in a public place or the exhibition of any book, postcard or the like which was deemed indecent, obscene or

³¹ Act 31 of 1892 (C).

³² 20 & 21 Vict C83 of 1857.

³³ (1868) LR 3 QB 360.

³⁴ See Chapter 3 of this dissertation par 321 - 322 and accompanying footnotes (*supra*).

³⁵ "Publication" was defined in section 1 of Act 31 of 1892 (C) (*supra*) as "any book, paper, newspaper, pamphlet, magazine, print, picture, lithograph, photo, drawing or any similar depiction." For an exposition of how Cape courts applied this Act, see *Regina v De Jongh* 1894 11 SC 326 and *Rex v Shaw* 1910 CPD.

³⁶ Act 38 of 1909 (T). Sections a(4), a(7) and 7 of this Act declared it an offence to write or convey any indecent or obscene material.

³⁷ See section 2(8) of Act 38 of 1909 (T) (*supra*).

³⁸ Ordinance 21 of 1902 (O).

³⁹ See section 6(19) of Ordinance 21 of 1902 (O) (*supra*).

harmful.⁴⁰

These piecemeal statutory attempts to deal with undesirable imported or local publications seemed to work well until it became apparent that a new political structure would be established whereby the Cape, Natal, Transvaal and Orange Free State would be unified under one constitutional dominium. I shall examine the effect that the establishment of the Union of South Africa had on attempts to proscribe sexually explicit material in South African law in more detail in the next paragraph.

5 2 2 South African Obscenity Law after 1910

Three years after the Union of South Africa was established in 1910, a new Customs Management Act⁴¹ was promulgated with the intent to establish a uniform system for the regulation of undesirable literature or objects imported into the Union. Once again, the new Act was fashioned after the Cape statute of 1872. In terms of section 46 of the Customs Management Act indecent, obscene or objectionable literature or articles were forfeited to the state and any person who imported or attempted to import such articles was guilty of an offence.⁴² The Customs Management Act was amended in 1934 by the Customs and Excise Amendment Act⁴³ to the effect that undesirable items were no longer specifically listed and the reference to prints, paintings, books, etc. was accordingly replaced with "goods."⁴⁴ The new 1934 Act also provided that the Minister of Home Affairs - in consultation with the newly appointed Board of Censors -

⁴⁰ See section 9 of Act 22 of 1898 (N) as well as section 19(a) of the Local Government Ordinance 21 of 1942 (N).

⁴¹ Act 9 of 1913.

⁴² In terms of section 97 of Act 9 of 1913 (*supra*), forfeited material could be confiscated either by a customs official or a member of the South African Police or Defence Force. Section 107 provided that the material could be destroyed after confiscation unless claimed by the owner or person in whose possession the material was found. In the ensuing criminal proceedings, the onus would rest on the importer or claimant to show that the import in question was authorised in terms of section 99 of the Act: see also *Commissioner of Customs v Watchtower Bible and Tract Society* 1942 AD 203 with respect to section 99 of Act 9 of 1913 (*supra*).

⁴³ Act 40 of 1934.

⁴⁴ See section 6 of Act 40 of 1934 (*supra*). This amendment apparently followed after a decision of the Witwatersrand Local Division in *Commissioner of Customs v Joffe* 1934 WLD 8.

had to decide whether goods would fall foul of the Act's provisions.⁴⁵ The Customs and Excise Amendment Act was again amended in 1939 to cater for undesirable material published in a series.⁴⁶ This amendment enabled the Minister of Home Affairs to ban an entire series of a publication and provided that anyone who sold, bought or distributed such a publication was guilty of an offence.⁴⁷ More amendments followed in 1944⁴⁸ and 1953⁴⁹ when exemption was granted for material imported for research purposes by educational institutions under permit of the Department of Home Affairs. The Customs Act which followed in 1955 was but a consolidation measure which brought no further changes to this area of the law.⁵⁰

As far as the regulation of local publications were concerned, the Censure Act of 1931⁵¹ brought a uniform arrangement in all four provinces and placed South African censorship law on a path which endured until the Indecent or Obscene Photographic Matter Act of 1967⁵² was repealed by the Films and Publications Act in 1996.⁵³ The most significant aspect of the 1931 Censure Act was that it established an independent administrative body (the Censorship Board) whose approval was necessary for the showing of any film or the publication of any picture, photo, painting or drawing (or any other public entertainment) which offended religious beliefs, disfavoured any population group or was deemed contradictory to the public interest and good

⁴⁵ See section 23(c) of Act 40 of 1934 (*supra*). The Board of Censors were appointed by virtue of section 2(1) of the Entertainments (Censorship) Act 28 of 1931.

⁴⁶ See section 1(1) of the Customs and Excise Amendment Act 39 of 1939 which amended section 23(c) of Act 9 of 1913 (*supra*).

⁴⁷ See section 2(2) of Act 39 of 1939 (*supra*). Although the Act provided that "the decision of the Minister [of Home Affairs] shall be final", the Cape Provincial Division held that the Minister had to give effect to the *audi altera partem* rule. The Minister therefore had to provide the importer an opportunity to show that the material in question was not indecent or offensive: see *Commissioner of Customs and Excise v Watchtower Bible and Tract Society* 1941 CPD 438.

⁴⁸ See the Customs Amendment Act 35 of 1944.

⁴⁹ See the Customs Amendment Act 36 of 1953. Section 2 of this Act replaced section 21(1)(f) of Act 35 of 1944 (*supra*).

⁵⁰ See Act 55 of 1955.

⁵¹ Act 28 of 1931.

⁵² Act 37 of 1967.

⁵³ Act 65 of 1996.

morals.⁵⁴ Initially, the new statutory measures appeared to function well until the Transvaal Supreme Court held in 1953 that the publisher of an obscene work enjoyed no protection under copyright law.⁵⁵ This decision engendered a storm of protest and heated parliamentary debate which eventually led the then Governor General, Dr EG Jansen, to appoint a commission of enquiry. The Commission of Enquiry in Regard to Undesirable Publications⁵⁶ was vested with the task to report on the most effective way to control indecent, obscene or harmful material produced or distributed in the Union of South Africa or in South West Africa⁵⁷ and had to comment on whether it was desirable to co-ordinate the Commission's proposed procedure with the existing system of control in respect of imported material. The Commission published its lengthy and detailed report - which contained a concept bill on indecent, offensive or harmful literature - on 3 October 1956.⁵⁸ The proposed bill purported to co-ordinate the control over internal and foreign publications through a Publications Board and recommended that appeals against decisions of the Publications Board should serve before a Publications Appeal Board. The recommendations of the Commission were not, however, favourably received by government largely due to the right of appeal against decisions of the Publications Board provided for in the proposed bill. Three years later, a second bill - which contained even more drastic proposals than those recommended by the Commission of Enquiry in Regard to Undesirable Publications - was tabled in Parliament.⁵⁹ This bill made provision for an Appeal Board to be appointed by the Minister of Home Affairs and purported to extend the existing system of regulation from foreign

⁵⁴ The first list of publications which were found to be undesirable under Act 28 of 1931 (*supra*) appeared in *Government Gazette* No 1308 August 21, 1939. This notice was later replaced by *Government Gazette* No 1355 September 8, 1949.

⁵⁵ See *Goeie Hoop Uitgewers v Central News Agency* 1952 (2) SA 843 (W).

⁵⁶ The members of the Commission of Enquiry in Regard to Undesirable Publications were Prof G Cronjé (hence the name Cronjé Commission), DF Abernethy, GF Laurence, Dr E Greyling and Mrs DEL de la Bat.

⁵⁷ The signing of the Treaty of Versailles on June 28, 1919 at the conclusion of the First World War required Germany to relinquish its subject territories, including German South West Africa. A year later, the Council of the League of Nations decreed that South West Africa would be a mandated territory under the supervision of the Union of South Africa. For a comprehensive overview of the (legal) implications of this mandate under international law, see John Dugard *The South West Africa / Namibia Dispute* (1973). For an overview of more recent events leading up to the political independence of Namibia in 1990, see the summary of Nico Steytler "The Judicialisation of Namibian Politics" 1993 9 *SAJHR* 477. See also par 5 3 2 and accompanying footnotes (*infra*).

⁵⁸ See the Report of the Commission of Enquiry in Regard to Undesirable Publications UG 42 of 1957 at 184 - 203.

⁵⁹ See Bill 57 of 1960.

to local publications. These proposals did not materialise as law either. During the following year, a third bill was tabled which proposed the consolidation of all existing regulatory measures.⁶⁰ After a lengthy process during which this bill served before two parliamentary committees, it was eventually accepted and promulgated by Parliament in 1963 as the Publications and Entertainments Act.⁶¹ The new Act was conceptualised to constitute a comprehensive control structure for publications and entertainments in the then recently established Republic of South Africa⁶² and thus formed an integral part of the somewhat tortured history of censorship in South African law. I shall now proceed to consider the juridical significance of the most important provisions of the Publications and Entertainments Act in closer detail.

5 2 3 The Publications and Entertainments Act of 1963

The Publications and Entertainments Act of 1963 was the first of three pieces of legislation⁶³ that constituted the legal foundation for the regulation of publications, films and entertainment considered indecent, obscene or immoral under South African law prior to the establishment of a new legal and constitutional order in 1994. Section 1 of the Publications and Entertainments Act targeted an extensive list of publications ranging from books, magazines and pamphlets to drawings, statutes and even records "or other inventions within or on which sound had been recorded."⁶⁴ Control over publications, public entertainments and films was exercised by a Publications Control Board (which was appointed by the Minister of Home Affairs) and the Board could, if necessary, appoint committees to assist it with the exercise of its duties.⁶⁵ In terms of section 5(2) of the Publications and Entertainments Act, a publication could be declared undesirable if it (or any part of it) was indecent or obscene or offensive or harmful to public morals, blasphemous, harmful to state security or contained indecent or obscene medical, surgical or physiological details which could be harmful to public morals. Section 6(1)(c) contained

⁶⁰ See Bill 77 of 1961.

⁶¹ Act 26 of 1963.

⁶² See the Constitution of the Republic of South Africa, Act 32 of 1961.

⁶³ Together with the Publications Act 42 of 1974 and the Indecent or Obscene Photographic Matter Act 37 of 1967. See also par 5 2 5 and par 5 4 and accompanying footnotes (*infra*).

⁶⁴ Newspapers which were members of the South African Press Union did not, however, fall under the control mechanism constituted by the Publications and Entertainments Act but were subject to a voluntary code of conduct to which members of the Press Union subscribed in 1962 instead.

⁶⁵ See section 4 of Act 26 of 1963 (*supra*).

Parliament's attempt to provide an exhaustive definition of matter "harmful to public morals"⁶⁶ which Rumpff JA on occasion aptly described as a "long, dismal list of topics"⁶⁷ of matter that could be conceived as indecent or obscene.⁶⁸

The Publications Control Board became the most significant component of the censorship apparatus under the new Publications and Entertainments Act. Any member of the public - including customs officials - could submit publications, films or entertainments to the Publications Control Board for investigation.⁶⁹ Decisions of the Publications Control Board taken in respect of a local publication could be taken on appeal to the Supreme Court within thirty days. Since an appeal to the Supreme Court in such an instance was neither an appeal in the legal sense nor a review on grounds of an illegality or irregularity,⁷⁰ the Supreme Court was enjoined to function purely as an administrative body whose opinion could be substituted for that

⁶⁶ Section 6 of the Publications and Entertainments Act 26 of 1963 (*supra*) read:
 "6(1) If in any legal proceedings under this Act the question arises whether any matter is indecent or obscene or is offensive or harmful to public morals, the matter shall be deemed to be -
 (a) indecent or obscene if, in the opinion of the court, it had the tendency to deprave or to corrupt the minds of persons who are likely to be exposed to the effect or influence thereof; or
 (b) offensive to public morals if in the opinion of the court it is likely to be outrageous or disgusting to persons who are likely to read or see it; or
 (c) harmful to public morals if in the opinion of the court it deals in an improper manner with murder, suicide, death, horror, cruelty, fighting, brawling, ill-treatment, lawlessness, gangsterism, robbery, crime, the technique of crimes and criminals, tippling, drunkenness, trafficking in or addiction to drugs, smuggling, sexual intercourse, prostitution, promiscuity, white-slavery, licentiousness, lust, passionate love scenes, homosexuality, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality, abortion, change of sex, night life, physical poses, nudity, scant or inadequate dress, divorce, marital infidelity, adultery, illegitimacy, human or social deviation or degeneracy, or any other similar or related phenomenon; or
 (d) indecent or obscene or offensive or harmful to public morals if in the opinion of the court it is in any other manner subversive of morality.
 6(2) In determining whether any matter is indecent or obscene or is offensive or harmful to public morals within the meaning of sub-section (1), no regard shall be had to the purpose of the person by whom that matter was printed, published, manufactured, made, produced, distributed, displayed, exhibited, sold or offered or kept for sale."

⁶⁷ In *Publications Control Board v William Heinemann Ltd* 1965 (4) SA 137 (AD) at 156.

⁶⁸ For the full text of subsection 6(1)(c) of Act 26 of 1963 (*supra*), see n 66 (*supra*).

⁶⁹ See section 8(1)(a) and (b) of Act 26 of 1963 (*supra*). See also the Customs Act 91 of 1964.

⁷⁰ See *Publications Control Board v William Heinemann Ltd* (*supra*).

of the Publications Control Board.⁷¹ It was established practice for the Publications Control Board to refrain from complying with the principles of natural justice. This practice was, in fact, endorsed by the Supreme Court when it held in *Central News Agency Ltd v Publications Control Board*,⁷² that the Publications Control Board was under no obligation to hear the writer, publisher or any other person affected or disadvantaged by its decision. The Supreme Court was thus of the opinion that the Publications Control Board could function without complying with the principle of *audi et alteram partem* and that the Board was not compelled to furnish reasons for its decisions either. It is not, therefore, surprising that the Publications Control Board adopted the practice of not disclosing any reasons for its decisions.⁷³

The Publications and Entertainments Act also made provision for appeals against decisions of the provincial or local division of the Supreme Court. In terms of section 14(3), a decision of the Supreme Division could be taken on appeal to the Appellate Court. A decision of the Supreme Court or Appellate Court was deemed to be a decision of the Publications Control Board.⁷⁴ Appeals in respect of films could, however, only be lodged with the Minister of Home Affairs and this right to appeal was only available to persons who submitted the film to the Publications Control Board for consideration. The Publications and Entertainments Act made no provision for an appeal to the courts in respect of films and the Minister's decision was treated as a

⁷¹ At 156 (*supra*). See also *South African Magazine Co v Publications Control Board* 1966 (2) SA 148 (AD) at 151 where the decision of the Appellate Division was cited with approval. This train of thought was developed further by the Appellate Division in *Marshall-Cavendish Ltd v Publications Control Board* 1965 (4) SA 173 (AD). In this instance, the court held that an appeal under section 8(1)(a) of the Publications and Entertainments Act required a court to come to its own conclusion *de novo*. It was not, therefore, necessary for the court to decide whether the Publications Control Board's decision was justified, nor was it necessary for the court to consider the reasons which prompted the decision of the Publications Control Board.

⁷² 1970 (2) SA 290 (C).

⁷³ This practice was, however, rightly criticised by the Appellate Division. In *Publications Control Board v William Heinmann Ltd* at 155 (*supra*), for example, Appellate Judge Rumpff observed that "[w]hen a court has to decide, on appeal, whether a book should be banned or not, it is expected to give its reasons in full and it will always be so. It is to be regretted that the Publications Control Board, acting, as far as the public is concerned, as an anonymous entity, did not give reasons for its decisions fully and in a proper way when asked to do so. In the present instance full reasons are not given and, in addition, it is stated the Board was motivated *inter alia* by certain passages in the book. What other factors 'motivated' the Board we were presumably not entitled to know."

⁷⁴ See section 14(4) of Act 26 of 1963 (*supra*).

decision of the Publications Control Board.⁷⁵ The reluctance of the Publications Control Board to fully disclose the reasons for its decisions did little to engender the trust of the South African public and this factor was in all probability the main contributor to the Board's failure as part of the apartheid government's censorship machinery during the 1960s.

South African courts also experienced some difficulty when called upon to interpret the criteria laid down by section 5 of the Publications and Entertainments Act. As indicated earlier in this paragraph, section 5 provided that a publication could be declared undesirable if it - or any part of it - was deemed indecent, obscene or offensive or harmful to public morality, blasphemous, harmful to state security or contained indecent or obscene medical, surgical or physiological details which could be offensive or harmful to public morals. Wilbur A Smith's literary debut, *When the Lion Feeds*, was the first publication to attract the attention of the Publications Control Board under the new statutory dispensation.⁷⁶ In July 1964, Smith's novel was declared undesirable and banned in terms of section 21 of the Customs Act.⁷⁷ On this occasion, the Publications Control Board surprised both friend and foe by opting to furnish reasons for its decision. The "reasons", however, amounted to little more than a summary of parts of section 6(1)(a) - 6(1)(c) of the Publications and Entertainments Act.⁷⁸ According to the Publications Control Board, Smith's novel had the tendency to deprave or corrupt the minds of persons who were likely to be exposed to the effect or influence thereof, was offensive or harmful to public morals, was likely to be outrageous or disgusting to persons who were likely to read it and dealt in an improper manner with promiscuity, passionate love scenes, lust, sexual intercourse, obscene language, blasphemous language, sadism and cruelty. In total, nineteen passages from the novel - considered in relation to the book as a whole - were thought to fall foul of the Act. The author and publisher appealed with success to the Cape Supreme Court in *William Heinemann Ltd and Others v Publications Control Board*.⁷⁹ The Publications Control Board - in turn - appealed with success to the Appellate Division in Bloemfontein. The transcript of the decision of the Cape Provincial Division reveals that the Publications Control Board relied on only five passages from Smith's debut novel. In ruling for the majority, Van Zyl J criticised the wording of section 5(2) of the Publications and Entertainments Act which provided that a publication could be banned

⁷⁵ See sections 14(1)(c), 14(2), 14(3) and 14(4) of Act 26 of 1963 (*supra*).

⁷⁶ *When the Lion Feeds* first appeared on bookshelves in South Africa on April 1, 1964. It was an immediate best seller in London where it had been available since March 16, 1964.

⁷⁷ Act 55 of 1955. See Government Notice 1024 July 10, 1964 published in *Government Gazette* No 850 July 10, 1964.

⁷⁸ For the full text of section 6(1) of Act 26 of 1963 (*supra*), see n 66 (*supra*).

⁷⁹ 1965 (2) SA 59 (C). The appeal was allowed with a majority of two to one.

by virtue of isolated passages that were deemed undesirable. He argued that parts of a publication cannot be completely isolated from the work as a whole for "[i]t is the virulence of the poison and the susceptibility of the victim that determines the size of the lethal dose."⁸⁰ He found that it is not the function of the law to cater for the sensibilities of the prudent at the expense of the liberties of other when the test for obscenity or indecency is to be established and accordingly held that none of the five passages in question were indecent or obscene. Moreover, the descriptions in question were neither offensive or harmful to public morals, nor did they deal in an improper manner with sexual intercourse or sadism.⁸¹ The majority of the Cape Supreme Court thus ruled in favour of the appellants. By contrast, Diemont J focussed in his dissenting opinion almost exclusively on one passage from the novel which contained a description of cunnilingus.⁸² He argued that "the degree of aversion, sickening repugnance, repulsiveness or shock to moral sensibilities must be such as to cause the reader to want to put the book down, not want to read the book further."⁸³ Diemont J also noted that these reactions "must be lasting ones and not merely those of the moment."⁸⁴ He thus concluded that since many readers would be shocked or repulsed by the "animal passion" contained in the aforementioned passage, the appeal should be rejected.⁸⁵ On appeal by the Publications Control Board to the Appellate Division,⁸⁶ Steyn CJ⁸⁷ found that section 6(1)(c) of the Publications and Entertainments Act did not constitute an outright ban on all matters of a sexual nature but that the section only targeted publications which deal with such matters in an *improper* manner. The court must therefore assess whether the publication or any part thereof has the "tendency to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof, or whether it is likely to be outrageous or disgusting to persons who are likely to read it, or whether it deals in an improper manner with any of the matters specified in subsection (c), or whether it is in any other manner subversive of morality."⁸⁸ In assessing whether a publication deals with sex in an improper manner, a court must judge current standards of morality and prudence. The Chief

⁸⁰ At 61 (*supra*).

⁸¹ See section 6(1)(b) - 6(1)(c) of Act 26 of 1963 (*supra*).

⁸² See *When the Lion Feeds* (1964) (Heinemann Publishers) at 70 - 72.

⁸³ At 86 (*supra*).

⁸⁴ At 87 (*supra*).

⁸⁵ At 88 (*supra*).

⁸⁶ *Publications Control Board v William Heinemann Ltd* (*supra*).

⁸⁷ Holmes JA and Potgieter JA concurring at 154 - 161 (*supra*).

⁸⁸ At 147 (*supra*).

Justice argued that although the price of the novel⁸⁹ was likely to render it inaccessible to young readers, the probable readers of the novel were nevertheless likely to fall into a broad category "including some of the younger generation."⁹⁰ Turning to the passages dealing with descriptions of sexual intercourse and cunnilingus, the Chief Justice found that the passages were calculated to incite lustful thoughts and stimulate sexual desire in its probable readers.⁹¹ Although a novel is not a tract on morality and does not become objectionable merely because it does not seek to make any contribution towards the advancement of moral integrity, Steyn CJ nevertheless argued that the passages in question left the impression that "such conduct is quite normal and natural, satisfying and right."⁹² Accordingly, since the passages might well have had the effect of inclining susceptible minds to the acceptance of the view that there is nothing wrong with such behaviour, the appeal was allowed with costs.

The difficulties which the Supreme Court and Appellate Division experienced in their respective attempts to formulate an appropriate standard to determine whether a publication would fall foul of the provisions of the Publications and Entertainments Act highlighted that the Act was unsatisfactory in a number of (related) respects. Probably the strongest indication thereof occurred in 1976 when the ban on *When the Lion Feeds* was retracted⁹³ in terms of section 15(2) of the Publications Act of 1974.⁹⁴ The new Publications Act attempted - in part - to address the shortcomings of the appeal procedure under section 14 of the Publications and Entertainments Act. Before I proceed to discuss the key features of the Publications Act,⁹⁵ the socio-political climate which paved the way for the adoption of this new statutory measure warrants closer inspection.

⁸⁹ In 1965, *When the Lion Feeds* retailed at R 3.20 per copy.

⁹⁰ At 152 (*supra*).

⁹¹ At 153 (*supra*).

⁹² At 154 (*supra*).

⁹³ See Government Notice 149 published in *Government Gazette* January 30, 1976.

⁹⁴ Act 42 of 1974.

⁹⁵ See par 5.2.5 and accompanying footnotes (*infra*).

5 2 4 The Stand-off between the Publications Control Board and Public Opinion

The period between 1965 and 1971 was characterised by evergrowing prohibitions, bans and the censoring of films, plays, books, periodicals, magazines and the arts.⁹⁶ The Publications Control Board increasingly became the target of sharp criticism (and even satire)⁹⁷ in the South African media. Public calls for a review of the South African system of censorship became virtually an everyday occurrence. The well known South African author, André P Brink, sounded a sober warning in the media when he argued that censorship in the manner conducted by the Publications Control Board generated a climate of fear which could well stifle creative Afrikaans literature.⁹⁸ Eventually members of the legal fraternity⁹⁹ and politicians¹⁰⁰ began to publicly oppose the Publications Control Board. Public opinion on the Publications Control Board was, however, divided for the Board still enjoyed strong support from the South African Teachers Union¹⁰¹ and the General Synod of the Dutch Reformed Church.¹⁰² These two opposing viewpoints on the merits of the Publications Control Board led to two petitions in 1971 which respectively became known as the "Noble anti-censorship petition"¹⁰³ and the "Rutter pro-

⁹⁶ Even women's pantihose was targeted when the packaging of an entire series of *Arwa* pantihose was banned in 1971 in terms of Government Notice 54 published in *Government Gazette* No 2973 January 15, 1971. Although the company, its manufacturers and distributors appealed against the Publications Control Board's decision, the matter was settled out of court: see *The Star* February 24, 1971 and *Die Oosterlig* February 25, 1971.

⁹⁷ Author Madeleine van Biljon's column in *Dagbreek* published on March 8, 1970 is a case in point. Her column contained a satirical attack on the members of the Publications Control Board, depicting them as brave soldiers in the fight against moral danger who would be worthy recipients of medals for bravery.

⁹⁸ See *The Rand Daily Mail* March 4, 1970.

⁹⁹ Professor JRC Milton of the Department of Criminal Law at the University of Natal was quoted in the *Natal Witness* March 5, 1971.

¹⁰⁰ René de Villiers, member of the Progressive Party, as quoted in *The Cape Argus* April 1, 1971.

¹⁰¹ See *Die Burger* May 5, 1976 and *Die Volksblad* May 5, 1975.

¹⁰² See *The Star* April 25, 1971 and *Die Vaderland* April 27, 1971.

¹⁰³ JN Noble was a resident from the city of Durban of the former Natal Province. According to newspaper reports at the time, his petition attracted 10, 000 signatures by January 1971: see *The Star* January 20, 1971 and *The Cape Argus* January 27, 1971. The Noble petition was supported by leading South African authors, poets and thespians, including Alan Paton, Uys Krige, Etienne Leroux, Jan Rabie, Marjorie Wallace, Marius Weyers, Sandra Prinsloo and Ernst van Heerden.

censorship petition".¹⁰⁴ Both petitions soon ran into difficulty. Whereas the Noble petition lost support when it was revealed that the petition would only seek to enlist white support, the Rutter petition was subjected to severe criticism in the English media. Both petitions were, however, submitted to the then Minister of Home Affairs, Mr Schalk van der Merwe, who appointed an inter-departmental committee of enquiry. The committee's recommendations were - on the whole - approved by government and incorporated into a new Publications and Entertainments Amendment Bill.¹⁰⁵ A parliamentary committee was subsequently charged to investigate the matter further, but since the committee could not conclude its investigation before the parliamentary recess, a presidential commission (which would eventually become known as the Kruger Commission) was appointed to continue this pressing investigation.¹⁰⁶ I shall discuss the findings and recommendations of the Kruger Commission in closer detail in the next paragraph.

5 2 5 The Kruger Commission Report and the New Publications Act of 1974

Due to serious differences of opinion between its members, the Kruger Commission published its findings and recommendations in two separate reports in 1974.¹⁰⁷ The Commission found that the system of control which was introduced in 1963 by the Publications and Entertainments Act no longer enjoyed full public support and thus proposed that a new independent, accessible and effective system be established and that reasons be furnished for decisions taken by its administrative structures. The Commission accordingly proposed that the key functions of the proposed new system of control (particularly in relation to decision making and administration) be separated and that a system of checks and balances be introduced. To this effect, the Commission recommended that three bodies be established, namely a Directorate, Board of Appeal and various committees. In practice, the Director of Publications would be seated in Cape Town, the Appeal Board in Pretoria and the committees would be scattered across the country. These arrangements constituted all but a streamlined and effective system. The recommendations of the Kruger Commission were none the less encapsulated in a bill which was

¹⁰⁴ GO Rutter was an official of the Youth for Christ Movement (Cape Town) at the time. The Rutter petition voiced strong support for the Publications Control Board and requested even stronger legislative measures. Among the prominent signatures that appeared on the Rutter petition were those of golfer Gary Player and Springbok rugby captain (later minister under National Party rule) Dawie de Villiers.

¹⁰⁵ Bill 61 of 1973.

¹⁰⁶ The presidential commission was appointed in July 1973: see Government Notice 1219 published in *Government Gazette* No 3976 July 13, 1973.

¹⁰⁷ The ensuing "Majority" and "Minority" Reports were respectively signed by nine and four members of the Kruger Commission.

adopted by Parliament on 11 September 1974 after long (and often heated) debate.¹⁰⁸ The new Publications Act¹⁰⁹ came into force on 1 April 1975 and repealed and replaced the Publications and Entertainments Act of 1963. The new Publications Act provided for a new system of control which was built into a cumbersome bureaucratic structure. The Publications Act contained six chapters which set out the various functions of the Director of Publications, committees (and advice committees),¹¹⁰ addressed the regulation of all publications, objects, films¹¹¹ and public entertainment,¹¹² set out the appointment procedure and powers of the Appeal Board¹¹³ as well as numerous other aspects which, *inter alia*, dealt with the admission of persons at places of public entertainment.¹¹⁴

One of the key features of the new Publications Act was that it created numerous administrative organs to assist with the regulation of undesirable material and objects under South African law. Section 2(a)(1), for example, provided for a Director of Publications who would be responsible for the administration of the Publications Act and all related matters.¹¹⁵ The Publications Act also made provision for the establishment of Coloured and Indian Advice Committees which had to advise committees appointed by the Director of Publications about the screening of films to the racial groups which these two Advice Committees represented. The Coloured and Indian Advice Committees were - in turn - appointed by the Executive Committees of the Representative Coloured Board and the South African Indian Board.¹¹⁶ Section 33 of the Publications Act established an Appeal Board of Publications. The function of the Board was to hear all appeals against decisions of the various committees and to hand down its findings which had to be conveyed to the appellant by the Director of Publications and published in the

¹⁰⁸ See *Hansard* of September 11, 1974 Column 2782.

¹⁰⁹ Act 42 of 1974. It is estimated that over thirty thousand publications were banned in the twenty two years of the Publications Act's existence: see, in general, Raymond Louw "Introduction" in J Duncan (ed) *Between Speech and Silence: Hate Speech, Pornography and the new South Africa* (1996) 14 at 28 (hereinafter referred to as *Between Speech and Silence*).

¹¹⁰ See Chapter 1 sections 2 - 7 of Act 42 of 1974 (*supra*).

¹¹¹ See Chapter 2 sections 19 - 29 of Act 42 of 1974 (*supra*).

¹¹² See Chapter 4 sections 30 - 34 of Act 42 of 1974 (*supra*).

¹¹³ See Chapter 5 sections 35 - 39 of Act 42 of 1974 (*supra*).

¹¹⁴ These matters were addressed under Chapter 6 of Act 42 of 1974 (*supra*).

¹¹⁵ These included the appointment of committees which would have the capacity to decide whether a publication was desirable or not: see section 8 of Act 42 of 1974 (*supra*).

¹¹⁶ See sections 6 and 7 of Act 42 of 1974 (*supra*).

*Government Gazette.*¹¹⁷

In spite of the detailed manner in which the Publications Act set out the structure and functions of the various administrative bodies which would both constitute and operate within the newly established system of censorship, the Act still failed to define key concepts, notably the terms "indecent" and "obscene". It was accordingly the task of the various committees to establish an appropriate test or standard to determine when a publication would be undesirable under the new structure. The committees often resorted to section 1 of the Publications Act which provided that the Christian way of life of the people of South Africa must be recognised when the provisions of the Act were applied. This general interpretive guideline was in step with section 47(2) of the Publications Act which provided that a publication would be undesirable if it - or part thereof - was indecent or obscene or offensive or harmful to public morals or blasphemous or offensive to the religious convictions or sentiments of any part of the population of the Republic of South Africa.¹¹⁸ In practice, the task to provide working definitions of the terms "indecent" or "obscene" fell on the shoulders of the Publications Appeal Board. In *Directorate of Publications v Brandwagpers (Pty) Ltd*¹¹⁹ the guidelines employed by the Publications Appeal Board to determine whether or not a publication would fall foul of the provisions of the Publications Act came under scrutiny. In this instance, the Directorate of Publications appealed to the Publications Appeal Board against a decision of a committee which found that two editions of *Die Brandwag* (published on 4 and 25 April 1975 respectively) were not undesirable. In respect of the first edition, the Publications Appeal Board found a photograph of a reclining woman whose breasts were exposed indecent or obscene on the basis that the photograph constituted a shameless and disrespectful treatment of nudity. Photographs of women's naked breasts which were published in the April 25 edition of the magazine were also deemed indecent or obscene on similar grounds. In its assessment of section 47(2)(a) of the Publications Act, the Publications Appeal Board sought to give meaning to the phrases "indecent or obscene", "offensive to public morals" and "harmful to public morals". With respect to the phrase "indecent or obscene", the Publications Appeal Board argued that the phrase must be interpreted restrictively. Since the Publications Appeal Board regarded the words "indecent" and "obscene" as synonyms, the Board found that these words accordingly bear the same meaning as in existing South African criminal law.¹²⁰ This meant that the two concepts were both directed at and thus concerned with nudity and

¹¹⁷ See section 13 of Act 42 of 1974 (*supra*).

¹¹⁸ Section 47(2)(a) - (b) of Act 42 of 1974 (*supra*) was identical to sections 5(2) and 6(1) of its predecessor Act 26 of 1963 (*supra*). See also par 5 3 1 - par 5 3 2 and accompanying footnotes (*infra*).

¹¹⁹ Unreported decision handed down on July 9, 1975. For a discussion of this decision, see "Appelraad oor Publikasies" 1976 *De Rebus* 73.

¹²⁰ See *Rex v Mcunu* 1940 NPD 99 at 100.

sexual matters.¹²¹ Therefore, the Publications Appeal Board concluded that a publication was indecent or obscene if it sought to appeal to the prurient interest, dealt with sex or nudity in a disrespectful manner or sought to stimulate sexual excitement through violence, brutality or cruelty. The criteria established by the Publications Appeal Board strongly resemble the standard of obscenity enunciated by the Supreme Court of the United States in *Roth v United States*¹²² which I discussed in full in the previous chapter.¹²³ In respect of the phrase "offensive to public morals" the Publications Appeal Board found that the phrase was intended to target publications which the South African public would regard as loathsome, disgusting or torturous (such as, for example, blasphemous or crude language). Publications would be "harmful to public morals" if their focus were on the indecent as opposed to the natural or normal. In all three instances, the criteria or standard to determine whether a publication would be deemed indecent or obscene, offensive or harmful to public morals was the convictions of the community. This meant that a golden mean had to be sought between the various opinions which existed within the South African community, or in the words of Snyman J, the opinion of the "average member of the community who is neither a prude nor a libertine".¹²⁴

I argued at length in the two preceding chapters of this dissertation¹²⁵ and earlier in this paragraph that a test of community standards which hinges on the tastes and attitudes of the average person is problematic when applied in respect of sexually explicit material. Perhaps in recognition, the Appeal Board found in the present instance that the Publications Act itself provided three guidelines to determine community opinion or standards. The first of these guidelines are found in section 1 of the Publications Act which, I have indicated, accentuates Christian values or a Christian philosophy of life. This guideline is problematic for the simple reason that the South African community subscribes to various religious traditions.¹²⁶ Within such a climate, the

¹²¹ See also *Rex v Meinert* 1932 SWA 56.

¹²² 354 US 476 (1957).

¹²³ See Chapter 3 of this dissertation par 3 3 1 - par 3 3 3 and accompanying footnotes (*supra*).

¹²⁴ See *MacMillan (South Africa) Publishers (Pty) Ltd v The Committee of Publications* (Unreported Case No 23).

¹²⁵ See Chapter 3 par 3 4 4 (*supra*) and Chapter 4 par 4 3 5 (*supra*) of this dissertation and accompanying footnotes.

¹²⁶ In recognition of the religious diversity of the South African population, section 31 of the South African Constitution, Act 108 of 1996, provides that the right of persons belonging to a religious community may not be infringed or denied. Section 1 of the Publications Act would undoubtedly have infringed section 31 of the South African Constitution in its failure to recognise religious diversity.

elevation of Christianity to a standard on the basis of which legal assessments are to be made, could well foster religious intolerance. The second guideline proposed by the Publications Appeal Board centred on the role which the Board attributed to committee members. The Publications Appeal Board argued that committee members must assume the (highly unusual) task of "educators". Nowhere in the history of censorship in South Africa has any member of an administrative body ever been required to approach the task of regulation with the objective to educate the South African public. If Parliament had wanted educational experts to serve on the Publications Appeal Board or its committees, it would have been prudent to make special provision for this in the Publications Act itself. Yet the only experts expressly named in the Publications Act are persons with a legal background. Surely it could not have been the intention that lawyers or legal academics should assume the task of moral guardians? Members of the legal profession should not - as a matter of principle - be expected to maintain (or even further) the moral foundation of a society, particularly when linked to the advancement of a particular political ideology. The final guideline which the Publications Appeal Board extracted from the provisions of the Publications Act (and which is to be welcomed) centred on the fact that the Act acknowledged that community standards are fluid and accordingly provided that decisions of the Board be reviewed after two years.¹²⁷

The views of the Publications Appeal Board on nudity are also indicative of its reliance on and strong commitment to the Christian values of a sector of the South African community. Any depiction of sexual organs including the anus, female breasts or buttocks was found to constitute the disrespectful treatment of nudity and would accordingly be indecent or obscene within the meaning of section 47(2)(a) of the Publications Act. Barry Dean aptly summed up the approach of the Publications Appeal Board as follows:

"[t]hese criteria ... appear to be a hotchpot for a variety of criteria used in different legal systems. The arousal of lust is something like the approach under the 1963 Act. The disrespectful or morbid treatment of nudity and the concrete cases are the old and more recent approaches in American law and the brutal context approaches reflects a tendency in modern English law. These widely differing approaches appear to have been thrown together without much appreciation that they represent totally different and sometimes inconsistent approaches to the problem. One gains the impression that the object is to ensure that the legislation be as comprehensive as possible."¹²⁸

Seven years prior to the Publications Act, Parliament promulgated the Indecent or Obscene Photographic Matter Act.¹²⁹ Since the provisions of the Indecent or Obscene Photographic

¹²⁷ See section 15 of Act 42 of 1974 (*supra*). Any member of the public could apply to the Director of Publications or the latter could itself review a decision.

¹²⁸ In "Censorship and the Law" 1976 *Philosophical Papers* 34 at 48.

¹²⁹ Act 37 of 1967.

Matter Act were challenged under the new South African constitutional dispensation, I shall refrain from discussing the provisions of this Act in the present paragraph and I intend to address the matter with reference to the decision of the South African Constitutional Court in *Case, Curtis v Minister of Safety and Security*¹³⁰ elsewhere in this chapter.¹³¹

Shortly after the first ever fully democratic elections were held in South Africa, the newly appointed Minister of Home Affairs, Dr Mangosutho Buthelezi, appointed a Task Group on Film and Publication Control in August 1994 under the chairmanship of Kobus van Rooyen¹³² to draft a new bill to replace the Publications Act of 1974.¹³³ On this occasion, a new statutory measure was thought to be necessary because the Publications Act undoubtedly impacted on various rights and freedoms enshrined in the Bill of Rights in South Africa's new Interim Constitution¹³⁴ as well as in international and regional human rights instruments such as the Universal Declaration

¹³⁰ 1996 (5) BCLR 609 (CC).

¹³¹ See par 5 4 and accompanying footnotes (*infra*). In *JT Publishing v Minister of Safety and Security* CCT 49/95 (an unreported decision of the South African Constitutional Court handed down on November 21, 1996), the court stressed that *Case; Curtis v Minister of Safety and Security* (*supra*) does not give the green light for the peddling of pornography. In this instance, the applicant sought a declaratory order from the Constitutional Court that sections of the Publications Act 42 of 1974 (*supra*) were unconstitutional and invalid. Didcott J held that since a declaratory order is a discretionary remedy and Parliament had in the meantime repealed Act 42 of 1974 (*supra*), neither the applicants nor anyone else could benefit from an order dealing with the "moribund and futureless" provisions of the old Act: see CCT 49/95 par 16 (*supra*).

¹³² Professor Van Rooyen is chairperson of the Department of Criminal Law at the University of Pretoria and head of the Broadcasting Complaints Commission of South Africa and the South African Press Council.

¹³³ In addition to the Director of Publications and the Chairperson of the Publications Appeal Board who were appointed *ex officio*, seven members of the public were appointed to the Task Group and a previous Chairperson of the Publications Appeal Board was appointed as Chairperson. The intention was not to appoint a Task Group which would be representative, but to employ the services of members of the public who have specialised knowledge in media matters and media law. The experience of some of the members in religious organisation, education, mediation and management generally, was regarded as an added benefit.

¹³⁴ Chapter 3 of the Constitution of the Republic of South Africa, Act 200 of 1993. The Interim Constitution entered into force on April 27, 1994.

of Human Rights,¹³⁵ the International Covenant on Civil and Political Rights,¹³⁶ the International Convention on the Elimination of All Forms of Racial Discrimination¹³⁷ and the African Charter on Human and Peoples' Rights.¹³⁸ I shall now proceed to consider the terms of reference as well as recommendations of the Task Group - which published its report on 1 December 1994¹³⁹ - in closer detail.

5 3 TOWARD A NEW STATUTORY LANDSCAPE FOR THE REGULATION OF FILMS AND PUBLICATIONS IN SOUTH AFRICAN LAW

5 3 1 The Drafting of a New Films and Publications Bill for South Africa

On the whole, the Task Group on Film and Publication Control concluded that the Publications Act of 1974 was flawed to such a degree that a mere statutory amendment would not salvage the Act in light of the challenges posed by South Africa's new constitutional order. The primary objective of the Task Group was therefore to draft a bill which could withstand scrutiny under the Bill of Rights of the Interim Constitution.¹⁴⁰ To realise this constitutional objective, the Task Group resolved to design a control structure based on the classification of material and the demarcation of age restrictions.¹⁴¹ Rather than opting for an administrative system which would solely be based on criminal law, the Task Group agreed on a national structure to exercise

¹³⁵ United Nations General Assembly Resolution 217 (III) of December 10, 1948.

¹³⁶ United Nations General Assembly Resolution 2200 A (XXI) of December 16, 1966. The International Covenant on Civil and Political Rights entered into force on March 23, 1976.

¹³⁷ United Nations General Assembly Resolution 2106 A (XX) of December 21, 1965. The International Convention on the Elimination of All Forms of Racial Discrimination entered into force on January 4, 1966.

¹³⁸ Popularly referred to as the Benjul Charter: Organisation of African Unity 21 ILM 58 of 1982.

¹³⁹ See *Report of the Task Group: Film and Publication Control* (1994).

¹⁴⁰ Act 200 of 1993 (*supra*). The Publications Act was thought to intrude severely and unreasonably upon the freedom of choice of adults by virtue of its wide scope which was aided by the use of vague terminology. Since the Publications Act gave preference to the Christian religion, provided for political intervention in certain circumstances and procedurally unfair administrative action, the Task Group concluded that the Publications Act was in direct conflict with the Bill of Rights in the Interim Constitution.

¹⁴¹ See par 5 3 3 1 and accompanying footnotes (*infra*).

administrative control over films and publications.¹⁴² To this end, the Task Group recommended that a Film and Publication Board be established¹⁴³ and that appeals be directed to a *quasi-judicial* Film and Publication Review Board.¹⁴⁴ As far as publications were concerned, the Task Group agreed that the new system should be based on complaints only and that the Film and Publication Board should not be authorised to investigate matters on its own, for this would directly implicate the right to procedurally fair administrative action guaranteed in section 24 of the Interim Constitution.¹⁴⁵ In respect of films, the Task Group recommended that distributors would have to apply for classification¹⁴⁶ and that appeals to the Supreme Court against decisions

¹⁴² The Task Group did, however, recommend that criminal sanctions be provided for where a person knowingly violates a decision of the Film and Publication Board. The requisite of intention was decided upon since negligence would, in the opinion of the Task Group, amount to too strict a limitation on freedom of speech and of choice. In so far as a publication is concerned, the intentional distribution of XX or X18 material (outside adult premises) is made an offence, even if the Film and Publication Board has not yet decided upon the matter. If the Film and Publication Board had previously decided that the material does not amount to XX or X18, this could be used as a defence.

¹⁴³ This recommendation found expression in section 3(1)(a) of Act 65 of 1996 (*supra*). In terms of section 4(1) of the Act, the Film and Publication Board shall consist of a chief executive officer (who shall be the chairperson of the Board in terms of section 4(2) of the Act) and such number of senior personnel, chief examiners and examiners as the Minister may determine having regard to the likely volume of applications and complaints which will be submitted to the Board in terms of the Act. Sections 4(3) and 6 of the Act respectively provide that the executive committee of the Film and Publication Board shall comprise of the chief executive officer and the senior personnel and that members of the Film and Publication Board shall be appointed by the President. For an exposition of the functions of the chief executive officer of the Film and Publication Board, see section 15 of Act 65 of 1996 (*supra*).

¹⁴⁴ The Film and Publication Review Board was subsequently established by virtue of section 3(1)(b) of Act 65 of 1996 (*supra*). Sections 6 and 5(1) of the Act respectively provide that the members of the Review Board are to be appointed by the President and shall consist of the chairperson and eight other members. In terms of section 5(4) of the Act, decisions of the Film and Publication Review Board shall be taken by a majority of votes, and in the case of an equality of votes, the chairperson shall have a casting vote. Disqualifications with regard to membership of the Review Board, period of office, vacation of and removal from office, remuneration, expenditure and other related issues are dealt with under Chapter 2 of the Act.

¹⁴⁵ See section 24(b) of Act 200 of 1993 (*supra*), now section 33(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 (*supra*).

¹⁴⁶ The Task Group recommended that television should not fall under the new proposed legislative structure since television - as a mass medium - differs substantially from films screened in theatres and videos which are rented from video distributors for personal use. The Independent Broadcasting Authority Act of 1993 provides for its own control mechanisms and the Code for Broadcasters is to be found in Schedule 1 of the Act. Section 56(2) of the Act

of the Film and Publication Review Board¹⁴⁷ should be possible where a film or publication is prohibited or limited to so-called adult premises.¹⁴⁸ The Task Group was in agreement that the regulation of films and publications should be based on their perceived harm rather than on vague notions of indecency, obscenity or offensiveness.¹⁴⁹ Consequently, the Task Group maintained that the regulation of films and publications had to be based on a compelling state interest in, for example, maintaining peace or the protection of children. In the words of Task Group chairperson, Kobus van Rooyen, "[it was believed that] the prevention of harm or, at least, of clearly perceived harm, should be the basis of any regulation in this area."¹⁵⁰

This view guided the Task Group to respond to the radical feminist argument that adult heterosexual pornography constitutes a degradation of the dignity of women. Although the Task Group took cognisance of the decision of the Supreme Court of Canada in *Regina v Butler*,¹⁵¹ it none the less came to the conclusion that the notion of degradation was too vague to withstand constitutional scrutiny. The Task Group was of the view that if the words "a substantial risk of harm" were to be added to the degradation of women, the criterion might be constitutionally acceptable because then the accent would be on the risk of harm. In the words of Van Rooyen, "[m]ere degradation was therefore [thought to be] insufficient; it had to create a 'substantial risk

also provides for the recognition of industry-based control. The National Association of Broadcasters has set up the Broadcasting Complaints Commission of South Africa which has been operative since August 1993.

¹⁴⁷ See section 21 of Act 65 of 1996 (*supra*).

¹⁴⁸ See section 24 of Act 65 of 1996 (*supra*). The occupant of the premises concerned must be the "holder of a licence to conduct the business of adult premises issued by a licensing authority in terms of section 2 read with item 2 of Schedule 1 of the Businesses Act 71 of 1991".

¹⁴⁹ This agreement was based on the results of a study conducted by James Lindgren where students' responses to questionnaires, based on popular legal definitions of pornography, were evaluated: see "Defining Pornography" 1993 141 *University of Pennsylvania Law Review* 1153. Lindgren found that the words "graphic sexually explicit" which were employed by Andrea Dworkin and Catharine MacKinnon in the civil rights ordinances for Cities of Minneapolis and Indianapolis were regarded as the least vague when compared to the terms employed by the United States Supreme Court in the two leading cases *Roth v United States* and *Miller v The State of California*, notably "prurient interest", "lacks serious literary value" and "patently offensive". Whereas "prurient interest" was regarded as most vague by 45% of the members of the response group, only 2% of the group deemed "graphic sexually explicit" vague: see 1993 141 *University of Pennsylvania Law Review* 1153 at 1197 (*supra*).

¹⁵⁰ See "The Drafting of a New Film and Publication Bill for South Africa" in J Duncan (ed) *Between Speech and Silence* 172 at 178 (*supra*).

¹⁵¹ [1992] 89 (4th) DLR 449.

of harm.”” Although the Task Group conceded that it lacked clarity on whether degradation could be based on mere sexual explicitness or nudity, the Task Group was confident that the criteria proposed for absolute bans (so-called XX material)¹⁵² “would go far in protecting women in the case of a crude mixture of sex and violence and in the case of certain forms of explicit violence.”¹⁵³ The Task Group thus adopted the position that a new Films and Publications Act “should promote the optimum amount of freedom for adults and protect children against what is harmful or disturbing.”¹⁵⁴ *Bona fide* technical, professional and scientific publications¹⁵⁵ would have to be exempted from statutory control and care had to be taken to exclude the possibility that isolated passages could result in the prohibition of an entire publication.¹⁵⁶

Another vexing issue with which the Task Group grappled was whether the promotion of racial hatred in a publication or a film should be a ground for prohibition under the proposed draft bill. Early in 1994, Parliament - in preparation for South Africa’s first democratic elections - repealed section 47(2)(d) of the Publications Act of 1974.¹⁵⁷ As pointed out above,¹⁵⁸ this subsection prohibited material which was deemed harmful to the relations between sections of the South African population. A publication could be deemed undesirable if it brought “any section of the inhabitants of the Republic into ridicule or contempt”¹⁵⁹ or was “harmful to the relations between any sections of the inhabitants of the Republic”.¹⁶⁰ Parliament’s rationale in 1994 was clear: the robust and uninhibited (political) debate necessary for free and fair elections would have been

¹⁵² See par 5 3 3 1 and accompanying footnotes (*infra*).

¹⁵³ See Van Rooyen in J Duncan (ed) *Between Speech and Silence* 172 at 179 (*supra*).

¹⁵⁴ At 179 (*supra*). My emphasis.

¹⁵⁵ The Task Group recommended that the term “bona fide” must indicate an objective appraisal by experts and that the publication or film itself should be the object of appraisal.

¹⁵⁶ To this end, the phrase “judged within context” is employed in Act 65 of 1996 (*supra*) to guard against the prohibition of a film or publication on the basis of isolated scenes or passages: see, for example, Schedules 1, 2 and 3 in respect of publications and Schedules 6, 7 and 8 in respect of films. This suggestion of the Task Group is incidently in step with the approach followed by Ogilvie Thompson CJ in *Publications Control Board v Republican Publishers (Pty) Ltd* 1977 (1) SA 288 (AD).

¹⁵⁷ Section 47(2)(d) of Act 42 of 1974 (*supra*) was repealed by the Abolition of Restrictions on Free Political Activity Act 206 of 1993.

¹⁵⁸ See par 5 2 5 and accompanying footnotes (*supra*).

¹⁵⁹ See section 47(2)(c) of Act 42 of 1974 (*supra*).

¹⁶⁰ See section 47(2)(d) of Act 42 of 1974 (*supra*).

impeded while these sections of the Publications Act remained in force. In light of Parliament's decision to repeal parts of the Publications Act, the Task Group decided that it would politicise the new dispensation if race relations were once again included in the concept bill. The Task Group was, however, careful to point out that the matter of hate speech was a question of policy to be decided upon by Parliament. This led the Task Group to concede that Parliament could - if it so wished - authorise the proposed Film and Publication Board to prohibit a publication or film on the basis that it was harmful to racial relations in South Africa. Otherwise Parliament could directly criminalise such publications and films. Appropriate legislation would prohibit any person to screen a film in public or distribute a publication which was likely to promote racial hatred.¹⁶¹

Before I proceed to consider the provisions of the ensuing Films and Publications Act,¹⁶² I shall first assess how Southern African countries (with a similar heritage of white minority rule, characterised by the systematic - and often brutal - repression of basic rights and freedoms and ultimately followed by a negotiated settlement)¹⁶³ have responded to the challenge of speech which incites hatred.

5 3 2 A Southern African Perspective on Incitement to Hatred

A commentator made the astute observation that "[w]e in South Africa have, through the policy of apartheid, raised the level of hate speech to a fine art."¹⁶⁴ South Africa and two of its neighbours, notably Namibia and Zimbabwe, are signatories to the International Covenant on Civil and Political Rights and the International Convention on the Elimination on All Forms of Racial Discrimination¹⁶⁵ which both contain provisions directed against the advocacy of racial hatred and discrimination. Article 20 of the International Covenant on Civil and Political Rights directs that "any propaganda for war"¹⁶⁶ and "any advocacy of national, racial and religious

¹⁶¹ *Bona fide* art, literature or scientific works would - as a matter of course - be exempted from such a statutory restriction, although age restrictions would still be applicable.

¹⁶² Act 65 of 1996 (*supra*): see *Government Gazette* No 17560 November 8, 1996.

¹⁶³ In South Africa, Zimbabwe and Namibia, the negotiated settlements all included mechanisms for the granting of amnesty to those who committed politically motivated crimes during the liberation struggle.

¹⁶⁴ See Louw in J Duncan (ed) *Between Speech and Silence* 14 at 15 (*supra*).

¹⁶⁵ See par 5 3 1 n 137 (*supra*).

¹⁶⁶ See article 20(1) of the International Covenant on Civil and Political Rights 2200 A (XXI) of 1966 (*supra*).

hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”¹⁶⁷ A similar provision is found in the International Convention on the Elimination of All Forms of Racial Discrimination, although with a greater emphasis on hate speech fashioned for the furthering of ideas of inequality and domination of one group over another. Article 4 reads:

“Article 4:

States condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.”¹⁶⁸

Zimbabwe and Namibia have both formulated a legal response to hate speech after gaining political independence in 1980 and 1990 respectively. In Zimbabwe, the post-independence period has been marked by continued hostilities between the approximately two hundred and fifty thousand white “settlers” and eight million blacks. These disputes continue to centre around access to agricultural land and have recently been marked by the occupation of land by war veterans, intimidation of farm workers and the killing of white farm owners. The political settlement reached at the Lancaster House Conference in 1979 ensured the white minority a measure of political power which was strikingly disproportionate to their numbers¹⁶⁹ and produced a Constitution¹⁷⁰ which contains a declaration of rights reminiscent of the constitutions of many former African colonies.¹⁷¹ Section 20(1) of the Constitution of Zimbabwe specifically guarantees freedom of expression. It reads:

“20(1) [e]xcept with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

¹⁶⁷ See article 20(2) of the International Covenant on Civil and Political Rights 2200 A (XXI) of 1966 (*supra*).

¹⁶⁸ See United Nations General Assembly Resolution 2106 A (XX) of December 21, 1965 (*supra*).

¹⁶⁹ In terms of the Lancaster House settlement, whites were guaranteed twenty out of the one hundred seats in Parliament. For a summary of the settlement proposals, see South African Institute of Race Relations *Survey of Race Relations in South Africa* (1980) at 655 - 668.

¹⁷⁰ The Constitution of Zimbabwe came into effect with independence on April 18, 1980.

¹⁷¹ Although cast in the form of a preamble, section 11 of the Constitution of Zimbabwe has been interpreted to confer substantive rights on the individual and not merely as a guide to the intention of the framers of the Declaration of Rights: see *In Re Munhumes* 1995(1) SA 551 (ZSC) at 555 - 556 and *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 (2) SA 182 (ZSC) at 186.

Specific exemptions to this guarantee are recognised in the Constitution of Zimbabwe itself. To this end, the Constitution provides that nothing contained in or done under the authority of any law shall be held to be in contravention of section 20(1) “... to the extent that the law makes provision for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings except so far as that provision or, as the case may be, the thing done under the authority thereof is shown to be reasonably justifiable in a democratic society.”¹⁷² As is usually the case, the new Zimbabwean democracy inherited legislation from the previous *régime*. Two statutes have a particular bearing upon incitement to hatred. The first is the Law and Order (Maintenance) Act of which section 44(2) declares it a criminal offence to:

- “(a) write, print or cause to be printed any subversive statement;
- (b) distribute or circulate any subversive statement among the public or any section of the public or supply any written or printed subversive statement to any other person;
- (c) display any writing conveying any subversive statement in such a position that it is visible from any place to which the public has access;
- (d) utter or by means of a recording apparatus play (otherwise than during the investigation of an offence or of proceedings in a court of law) any subversive statement in the hearing of any other person;
- (e) make a subversive statement which is recorded by means of a recording apparatus.”

The phrase “subversive statement” in section 44(2) of the Act has a wide meaning and includes any statement which is likely to -

- “(a) bring the President in person into hatred or disrepute;
- (b) excite disaffection against the President in the person of the government or Constitution of Zimbabwe;
- (c) incite others to attempt to procure, other than by lawful means, the alteration of any matter established by law;
- (d) engender or promote feelings of hostility to or expose to contempt, ridicule or disesteem any group, section or class in or of the community of a particular *race, religion or colour*.”¹⁷³

The second statutory enactment which bears on the subject of incitement to hatred in Zimbabwe is section 3(1)(n) of the Miscellaneous Offences Act. This section makes it an offence to use obscene, abusive, insulting or threatening language in a public place. Section 3(1)(n) has been the subject of one reported decision. In *State v Du Plessis*,¹⁷⁴ it was alleged that the appellant had contravened the section by uttering the words “who brought this thing here, this kaffir?” at the Chipinge Country Club in relation to the complainant. The appellant’s conviction for the

¹⁷² See section 20(2)(b)(i) of the Constitution of Zimbabwe of 1979 (*supra*).

¹⁷³ My emphasis. The penalty for a contravention of section 44(2) of the Law and Order (Maintenance) Act is imprisonment for up to five years. The option of a fine is not available. There are no reported cases on this section.

¹⁷⁴ 1992 (1) SACR 594 (ZS).

contravention of section 3(1)(n) was reversed on appeal on the basis that the offensive words were not uttered in a "public place".¹⁷⁵ The Supreme Court held that the State had failed to discharge the onus of establishing that ordinary members of the public were present as of right "in the sense that they had access, although being neither members of the club, nor the invited guests of members."¹⁷⁶

In the twenty years since independence, relatively few constitutional cases have emanated from Zimbabwe. In spite of a disturbing undercurrent of official intolerance and attempts to intimidate the media,¹⁷⁷ the Supreme Court of Zimbabwe has - for the most part - shown itself willing to protect and uphold the constitutional guarantee of freedom of expression, particularly in two noteworthy cases concerning contempt of court¹⁷⁸ and the right of assembly.¹⁷⁹ In Namibia, the Constitution (which was likewise adopted on independence)¹⁸⁰ represents an explicit break with the past. The preamble to the Constitution of Namibia expressly refers to the struggle against colonialism, racism and apartheid.¹⁸¹ The Constitution guarantees those basic rights and liberties found in all major constitutions and international human rights instruments including freedom

¹⁷⁵ At 595 (*supra*).

¹⁷⁶ At 596 (*supra*). Although not strictly called upon to do so, the court did not comment adversely on the appellant's behaviour.

¹⁷⁷ See, in general, Article 19 *Truth from Below: The Emergent Press in Africa* (1991) at 66 - 69 and Article 19 *Information, Freedom and Censorship* (1991) at 67 - 70.

¹⁷⁸ See *State v Hartmann* 1984 (1) SA 305 (ZSC). For a comment on this case, see Gilbert Marcus *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (1986) at 354 - 356.

¹⁷⁹ See *Re Munhumeso* (*supra*).

¹⁸⁰ The Constitution of Namibia, Act 1 of 1990, was adopted on March 21, 1990.

¹⁸¹ In *State v Van Wyk* 1992 (1) SACR 147 (Nm SC) at 172 - 173 Mahomed JA (as he then was; later to become the first black Chief Justice of post-apartheid South Africa) said the following of Act 1 of 1990 (*supra*): "[t]hroughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread - an abiding 'revulsion' of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people 'for so long' and a commitment to build a new nation 'to cherish and to protect the gains of our long struggle' against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity."

of expression,¹⁸² dignity¹⁸³ and equality.¹⁸⁴ In 1991, the Racial Discrimination Prohibition Act was passed by the Namibian Parliament.¹⁸⁵ It is a comprehensive statute which - according to its long title - is intended to render criminally punishable "certain acts and practices of racial discrimination and apartheid in relation to public amenities, the provision of goods and services, immovable property, educational and medical institutions, employment, associations, religious and involving the *incitement of racial disharmony and victimisation*."¹⁸⁶ Section 11 of the Racial Discrimination Prohibition Act attends to incitement to racial disharmony in the following terms:

"11(1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with intent to -

(a) threaten, ridicule or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or

(b) cause, encourage or incite disharmony or feelings of hostility, hatred or ill-will between different racial groups or persons belonging to different racial groups; or

(c) disseminate ideas based on racial superiority.

11(2) For the purposes of sub-section (1) 'article' shall include any flag, insignia or emblem.

11(3) No person shall establish, support or be a member of or participate in the activities of an organisation or movement of which the aim is to engage in acts of violence against members of any particular racial group or in activities aimed at causing, bringing about, promoting or contributing towards any such acts."¹⁸⁷

The constitutionality of section 11 of the Racial Discrimination Prohibition Act arose in *Kauesa v Minister of Home Affairs*.¹⁸⁸ The applicant, a warrant officer in the Namibian Police Force, had participated in a panel discussion which was broadcast on national television in which issues relating to the administration of the police force were discussed. The applicant stated, *inter alia*, that white officers in the command structure of the police force were determined to undermine the Namibian government's policy of reconciliation, had facilitated corruption, abused their power and collaborated with "traitors and terrorists" by supplying weapons to them. As a result of the televised statements, the applicant faced a departmental hearing for an alleged contravention of a police regulation which prohibited members of the police force from

¹⁸² See article 21(1)(a) of Act 1 of 1990 (*supra*).

¹⁸³ See article 8(1) of Act 1 of 1990 (*supra*).

¹⁸⁴ See article 10 of Act 1 of 1990 (*supra*).

¹⁸⁵ Act 26 of 1991.

¹⁸⁶ My emphasis.

¹⁸⁷ The penalty for conduct in contravention of section 11 could consist of a fine not exceeding R80 000 or imprisonment for a period not exceeding fifteen years or both such fine and imprisonment: see section 14(b) of Act 26 of 1991 (*supra*).

¹⁸⁸ 1994 (3) BCLR 1 (NmH).

commenting unfavourably in public upon the administration of the force. The applicant sought an order to declare the regulation invalid on the basis that it is in conflict with the fundamental right of freedom of speech and expression guaranteed in article 21 of the Namibian Constitution. Although not called upon to do so, the Namibian High Court gave extensive consideration to the constitutionality of section 11(1)(b) of the Racial Discrimination Prohibition Act. With reference to the offending statements, O'Linn J found that the speech was of a racist nature. It contained "untrue and far-fetched allegations" which undoubtedly injured the dignity and good name of the command structure of the police force and "particularly of the white senior officers in that command structure."¹⁸⁹ In commenting on the purpose of section 11(1)(b), O'Linn J pointed out that the section had been enacted against the background of a long (political) struggle against a dispensation where the violation of the dignity of the person and discrimination on the basis of race, colour, ethnic origin, sex and creed were endemic. The people of Namibia accordingly set out their values and aims in the preamble to the Constitution and committed themselves to eradicate the evils of the previous dispensation. He thus found that the prohibition contained in section 11(1)(b) of the Racial Discrimination Prohibition Act was an attempt to give further sustenance to these constitutional values and aims.¹⁹⁰ After considering the constitutionality of the section in some forty pages of the judgment (and although not strictly at issue in the proceedings) O'Linn J concluded that section 11(1)(b) was not in conflict with the Constitution of Namibia.¹⁹¹

An issue which has arisen since independence is the approach adopted by Namibian courts in respect of racially motivated crimes. In *State v Van Wyk*,¹⁹² the accused was charged with murder which had resulted from an unprovoked assault. In mitigation of sentence, the appellant led expert evidence by a psychologist that the crime was racially motivated. The expert evidence was to the effect that the likelihood of becoming a racist was greater if an individual grew up in a racist environment, governed by racist legislation and subjected to racist indoctrination. The tenor of the evidence was thus that an accused who commits a racially motivated crime is entitled - from a psychological perspective - to be afforded more sympathy if racism was induced through his or her environment.¹⁹³ The Appellate Court was quick to dismiss this argument. Mohammed AJA argued that to allow the racist socialisation of pre-independence Namibia to operate as a mitigating circumstance after the Constitution has been publicly adopted, widely disseminated

¹⁸⁹ At 15 (*supra*).

¹⁹⁰ At 51 (*supra*).

¹⁹¹ At 55 (*supra*).

¹⁹² 1992 (1) SACR 147 (Nm).

¹⁹³ At 167 (*supra*).

and vigorously debated both in Namibia and the international community, would serve to subvert the objectives of the Constitution. Moreover, to state that the appellant's racism was conditioned by a racist environment would impair the "process of national reconciliation and nation building" and "retard the speed with which Namibian society has to recover from the legacy of its colonial past."¹⁹⁴

South Africa is the youngest of the Southern African democracies. The Interim Constitution which took effect of 27 April 1994 promised a decisive break with a deplorable history of institutionalised racial oppression. Although the Interim Constitution purported to be a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence,"¹⁹⁵ South Africa's heritage of racism cannot simply be wished away. Issues of race are therefore likely to continue to play a significant role in South African legal and political debate. The law is accordingly confronted with the difficulty of finding the means to accommodate political programmes which might be considered racist within a constitutional dispensation which - in essence - amounts to a rejection of apartheid and all its manifestations. Before the transition to democracy in 1994, liberal South African thinkers argued that there existed a need for laws which would prohibit incitement to racial hatred, particularly in light of our racially diverse society.¹⁹⁶ Until repealed by the Films and Publications Act in 1996, the

¹⁹⁴ At 173 (*supra*). As a former German colony, there have also been occasional expressions of Nazi sympathy in Namibia, the most recent of which occurred with the placement of an advertisement in the *Windhoek Advertiser* August 17, 1994 which commemorated the death of Rudolf Hess. The advertisement in question sought to eulogise Hess as a "martyr of peace" who became "part of history when, on May 10, 1941, he flew to the real wire-drawers of World War II in England with a peace message of the *Führer* Adolf Hitler to end the big suffering." See also, in general, Media Institute of Southern Africa *Action Alert Up-Date - Namibia* (2) July 18, 1995.

¹⁹⁵ Act 200 of 1993 (*supra*) concluded with an unnumbered section entitled "National Unity and Reconciliation" in which these sentiments were expressed.

¹⁹⁶ See, in general, John Dugard *Human Rights and the New South African Legal Order* (1978) at 177 and AS Mathews *Law, Order and Liberty in South Africa* (1971) at 211. The African National Congress (ANC) has long advocated the need for laws to prohibit incitement to racial hatred. To this end, the Draft Bill of Rights published by the ANC's Constitutional Committee in 1990 recommended a limitation on the guarantee of freedom of expression which would immunise laws that prevent incitement to racial hatred from constitutional review. Article 14 par 3 and 4 specifically envisaged a derogation from the guarantees of freedom of thought, speech, expression, opinion and the press which were guaranteed in article 4 of the Draft Bill of Rights. Article 14 of the ANC's Draft Bill of Rights read:
 "14(3) The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide

Publications Act of 1974 remained the principal vehicle in South African law for effecting direct censorship in the form of the prohibition of publications and films.¹⁹⁷ The transition to democracy and the lifting of restrictions on previously banned organisations inevitably gave rise to political tensions. Supporters of the former liberation movements - now free from any real threat of political persecution - frequently ventilated anger directed at the white minority. The response from militant right wing organisations was no less severe.¹⁹⁸ While supporters of the Pan Africanist Congress (PAC) were frequently heard to chant the slogan "one settler, one bullet" with impunity, a prominent member of the African National Congress (ANC) on a number of occasions encouraged mass audiences to chant the slogan "kill the boer, kill the farmer". Peter Mokaba (later to become a member of Parliament) addressed a mass meeting at the University of the Witwatersrand attended by approximately one thousand students at which the slogan was chanted.¹⁹⁹

Although some members of the South African legal community supported the idea that an

the population on grounds of race, colour, language or creed.

14(4) With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group."

¹⁹⁷ See section 47(2)(c) and 47(2)(d) of Act 42 of 1974 (*supra*). These provisions were however repealed shortly before the first democratic elections in 1994 by the Abolition of Restrictions on Free Political Activity Act 206 of 1993 (*supra*).

¹⁹⁸ At a meeting of white South African mineworkers on July 20, 1991, banners carrying the words "open our town - one black one bullet" were openly displayed. Similar sentiments were expressed on banners at a picket line during a labour dispute at the South African Broadcasting Corporation (SABC) by members of the Media Workers' Association of South Africa (MWASA) on August 10, 1993.

¹⁹⁹ On this occasion, the South African police were interested in instituting a prosecution. But instead of attempting to obtain evidence from any of the number of students and University security authorities who attended the meeting, the police sought to extract information from a journalist, one Andries Cornelissen, who had written a report concerning the events in question. Since Cornelissen refused to make a statement, he was subpoenaed in terms of section 205 of the Criminal Procedure Act 51 of 1977 which enables a person who has material or relevant information concerning the suspected commission of an offence to be interrogated concerning his knowledge of the offence which, in the present instance, was the offending speech. Cornelissen refused to comply with the subpoena and was subsequently sentenced to a term of imprisonment. No prosecution against Mokaba was instituted. Cornelissen did, however, succeed in having the subpoena set aside in court: see *S v Cornelissen; Cornelissen v Zeelie* NO 1994 (2) SACR 41 (W).

appropriate legal response had to be formulated to speech that incites hatred,²⁰⁰ the drafters of the Interim Constitution refrained from utilizing the supreme law of the Republic as a direct means to accomplish this end. Shadrack Gutto²⁰¹ argued convincingly that it would be appropriate in light of South Africa's particular legal and political history to regulate speech that would constitute the abuse of freedom of expression and not the "proper use of free speech and expression, however critical or robust it may be."²⁰² Since the primary object is to protect and promote human rights and freedoms as a whole (and not only some chosen rights and freedoms preferred by a particular segment of the South African community), the scope of regulation, in the words of Frank Michelman, must be drawn at such a level to catch only the "clearest cases of racially vilifying and personally harassing speech."²⁰³ Gutto argued that the scope of prohibited hate speech could well be extended to also include "obvious candidates of sexist or ethnicist speech".²⁰⁴ He accordingly suggested a wider scope of regulation than mere incitement to violence as suggested by some legal scholars.²⁰⁵ In agreement with Gilbert Marcus, Gutto maintained that the regulation of free speech should take place in the context of "entrenched fundamental rights, freedoms and duties" as opposed to "draconian regulations in the absence of constitutional guarantees, as was the case in the heydays of apartheid."²⁰⁶ The general object of a law against the propagation of hate speech would thus be to express society's "collective disapproval of racism or sexism" and to "discourage and limit" (as opposed to eliminate) the

²⁰⁰ See, for example, Denise Meyerson "No Platform for Racists: What Should the View of those on the Left Be?" 1990 6 *SAJHR* 394 and Gilbert Marcus "Racial Hostility: The South African Experience" in S Coliver (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (1992) 208 (hereinafter referred to as *Striking a Balance*) and "Reasonable Censorship" in H Corder (ed) *Essay on Law and Social Practice in South Africa* (1988) 349.

²⁰¹ Gutto is the Deputy Director of the Centre or Applied Legal Studies at the University of the Witwatersrand.

²⁰² See "The Criminalisation of Hate Speech?" in J Duncan (ed) *Between Speech and Silence* 102 at 121- 122 (*supra*).

²⁰³ See "Universities, Racist Speech and Democracy in America: An Essay for ACLU" 1992 27 *Harvard Civil Rights - Civil Liberties Law Review* 339 at 344.

²⁰⁴ In J Duncan (ed) *Between Speech and Silence* 102 at 121 (*supra*).

²⁰⁵ Notably Meyerson 1990 6 *SAJHR* 394 at 394 - 398 (*supra*) and Alfred Cockrell "No Platform for Racists: Some Dogmatism Regarding the Limit of Tolerance" 1991 7 *SAJHR* 339 at 339 - 340.

²⁰⁶ In J Duncan (ed) *Between Speech and Silence* 102 at 122 (*supra*). See also Marcus in S Coliver (ed) *Striking a Balance* 208 - 222 (*supra*).

propagation of such ideas and thought in public.²⁰⁷

The drafters of the South African Constitution responded to these sentiments and included the prohibition on the advocacy of hatred that constitutes incitement to cause harm as a specific internal limitation of the guarantee of freedom of expression contained in section 16 of the Constitution. Section 16(1) of the South African Constitution guarantees the right to freedom of the press and other media,²⁰⁸ freedom to receive and impart information or ideas,²⁰⁹ the freedom of artistic creativity,²¹⁰ academic freedom and freedom of scientific research.²¹¹ However, section 16(2) expressly states that the right in subsection (1) does not extend to propaganda for war,²¹² incitement of imminent violence²¹³ or the advocacy of hatred that is based on the categories of race, ethnicity, gender or religion and that constitutes incitement to cause harm.²¹⁴ The South African Constitution thus takes the debate on hate speech to an unprecedented level when compared to the legal responses formulated by other Southern African democracies. The categories enunciated in section 16(2)(c) of the South African Constitution bear a strong resemblance to article 14(4) of the ANC's Draft Bill of Rights of 1990 to the extent that the advocacy of hatred on grounds of ethnicity, religion and gender is expressly prohibited. Section 16(2)(c) of the South African Constitution therefore places speech that incites hatred on grounds of ethnicity, religion and gender on an equal footing as incitement to racial hatred. This formulation is to be welcomed since it requires consideration of the impact of speech which incites gender hatred in relation to instances of gender-specific violence, degradation and abuse within the ambit of a supreme constitution with a justiciable bill of rights. The South African Constitution is therefore unique in the sense that it can facilitate an analysis of particular genres of pornography (conceptualised as a mode of expression) that could be said to constitute incitement to gender hatred that may otherwise not have elicited constitutional scrutiny.

Having assessed the legal responses of Southern African democracies to speech that incites hatred, I shall now proceed to discuss the most important features of the Films and Publications

²⁰⁷ At 122 (*supra*).

²⁰⁸ See section 16(1)(a) of Act 108 of 1996 (*supra*).

²⁰⁹ See section 16(1)(b) of Act 108 of 1996 (*supra*).

²¹⁰ See section 16(1)(c) of Act 108 of 1996 (*supra*).

²¹¹ See section 16(1)(d) of Act 108 of 1996 (*supra*).

²¹² See section 16(2)(a) of Act 108 of 1996 (*supra*).

²¹³ See section 16(2)(b) of Act 108 of 1996 (*supra*).

²¹⁴ See section 16(2)(c) of Act 108 of 1996 (*supra*).

Act of 1996, including the provisions of the Act which relate to the incitement of gender hatred.

5 3 3 The New Films and Publications Act of 1996

The long title of the new Films and Publications Act of 1996 states, *inter alia*, that the Act provides for the classification of certain films and publications,²¹⁵ the establishment of a Film and Publication Board and a Film and Publication Review Board²¹⁶ and the repeal of certain laws.²¹⁷ The new Act contains eight chapters which - together with twelve schedules²¹⁸ - contain key definitions,²¹⁹ address matters pertaining to the Film and Publication Board and the Film and Publication Review Board,²²⁰ attend to complaints and applications concerning publications²²¹ and the classification of films,²²² set out the right to appear before the Film and Publication Review Board and Supreme Court,²²³ list exemptions in respect of publications and films,²²⁴ shed light on the legal²²⁵ consequences of conduct contrary to classifications and deal with regulations,

²¹⁵ See Chapter 4 (section 18) of Act 65 of 1996 (*supra*). Chapter 6 (sections 22 - 24) and Chapter 7 (sections 25 - 30) respectively deal with exemptions and the prohibition of conduct contrary to the classification structure set out in the Act.

²¹⁶ See Chapter 2 (sections 2 - 15) of Act 65 of 1996 (*supra*).

²¹⁷ See Schedule 12 (section 33) of Act 65 of 1996 (*supra*). The acts which were repealed in whole include the Indecent or Obscene Photographic Matter Act 37 of 1967 (*supra*), the Publications Act 42 of 1974 (*supra*), the Transkei Publications Act 18 of 1977, the Publications Amendment Act 79 of 1977, the Publications Amendment Act 109 of 1978, the Bobhuthatswana Publications Act 36 of 1979, the Publications Amendment Act 44 of 1979, the Venda Publications Act 15 of 1983 and the Publications Amendment Act 60 of 1986. In addition, the proviso to section 29(2) of the Post Office Act 44 of 1958, provisions of the Divorce Act 70 of 1979 (in so far as it related to the Publications Act of 1974), provisions of the Transfer of Powers and Duties of the State President Act 51 of 1991 (in so far as it related to the Publications Act of 1974) and section 1 of the Abolition of Restrictions on Free Political Activity Act 206 of 1993 (*supra*), were also repealed.

²¹⁸ See par 5 3 3 1 and accompanying footnotes (*infra*).

²¹⁹ See Chapter 1 section 1(i) - (xviii) of Act 65 of 1996 (*supra*).

²²⁰ See Chapter 2 sections 3 - 15 of Act 65 of 1996 (*supra*).

²²¹ See Chapter 3 sections 16 - 17 of Act 65 of 1996 (*supra*).

²²² See Chapter 4 section 18 of Act 65 of 1996 (*supra*).

²²³ See Chapter 5 sections 19 - 21 of Act 65 of 1996 (*supra*).

²²⁴ See Chapter 6 sections 22 - 24 of Act 65 of 1996 (*supra*).

²²⁵ See Chapter 7 sections 25 - 30 of Act 65 of 1996 (*supra*).

and the amendment and repeal of laws.²²⁶

For the first time in the history of South African law, the new Films and Publications Act makes provision for a system of regulation which hinges on the *classification* of films and publications. My discussion of the provisions of the new Films and Publications Act - which is to follow directly below - will unfold in three parts. To this end, I shall first briefly set out the new system of classification (including the legal implications of conduct contrary to the system of classification), whereafter I shall consider the impact of the new system on South African law. The final part of my discussion will relate to the statutory measures which the Films and Publications Act has introduced to combat the advocacy of hatred in light of the prohibition of hate speech contained in the South African Constitution.²²⁷

5 3 3 1 A New System of Classification

Schedules 1 - 10 of the Films and Publications Act shed light on the new system of classification. Schedules 1 - 4 make provision for four distinct classifications, namely XX, X18, R18 and F18 in respect of *publications*.²²⁸ In terms of Schedule 1, a publication shall be classified XX if - judged within context - it contains a simulated or real presentation of a person who is (or is depicted as being) under the age of eighteen years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity;²²⁹ or contains a presentation of explicit violent sexual conduct;²³⁰ bestiality;²³¹ explicit sexual conduct which degrades a person and which constitutes incitement to cause harm;²³² or contains a presentation of the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm.²³³

²²⁶ See Chapter 8 sections 31 - 35 of Act 65 of 1996 (*supra*).

²²⁷ See par 5 3 2 and accompanying footnotes (*supra*).

²²⁸ In terms of Schedule 5 of Act 65 of 1996 (*supra*), the XX or R18 classification shall not, however, be applied in respect of a *bona fide* scientific, documentary, literary or - except in the case of Schedule 1(1)(a) of the Act - an artistic publication.

²²⁹ Schedule 1(1)(a) of Act 65 of 1996 (*supra*).

²³⁰ Schedule 1(1)(b) of Act 65 of 1996 (*supra*).

²³¹ Schedule 1(1)(c) of Act 65 of 1996 (*supra*).

²³² Schedule 1(1)(d) of Act 65 of 1996 (*supra*).

²³³ Schedule 1(1)(e) of Act 65 of 1996 (*supra*).

Under Schedule 2 of the Films and Publications Act, a publication shall be classified X18 if - judged within context - it contains a simulated or real presentation of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of genitals,²³⁴ or if it describes predominantly and explicitly any or all of the acts described in Schedule 1 of the Act.²³⁵

Schedule 3 of the Films and Publications Act authorises the Film and Publication Review Board to impose a R18 classification on a publication if it is judged necessary to protect children in the relevant age group against harmful or disturbing material in the publication. Once a R18 classification has been imposed, a publication may only be distributed to persons older than eighteen years of age (or older than the specified younger age) and must bear a distinct notice of such age restriction.²³⁶ Such a publication may furthermore only be distributed if it is in a sealed and, if necessary, opaque wrapper.²³⁷ Periodicals can be awarded a F18 classification under Schedule 4 of the Films and Publications Act if six consecutive issues thereof are likely to contain material which falls within the scope of Schedule 3 of the Act and the publisher (or his or her representative) consents to such an order.

Schedules 6 - 9 of the Films and Publications Act set out the system of classification to be applied in respect of *films*. Under Schedule 6 of the Act, the provisions of Schedule 1(1)(a) - (e) in respect of publications is *mutatis mutandis* applicable to films. Whereas Schedule 7 provides for an X18 classification for films which contain scenes of explicit sexual conduct which - in the case of sexual intercourse - includes an explicit visual presentation of genitals, Schedules 8 and 9 of the Films and Publications Act respectively make provision for age restrictions in respect of films and the exemption of *bona fide* scientific, documentary, dramatic or - except in the case of Schedule 6(1)(a)²³⁸ - artistic films. The provisions of Schedule 10 - which address the promotion of religious hatred in a publication or film - will be discussed later.²³⁹

Any person who knowingly distributes or advertises for distribution a *publication* classified as XX, X18, R18 or F18²⁴⁰ or who knowingly exhibits in public or distributes any *film* which has

²³⁴ Schedule 2(1) of Act 65 of 1996 (*supra*).

²³⁵ Schedule 2(2) of Act 65 of 1996 (*supra*).

²³⁶ Schedule 3(1) of Act 65 of 1996 (*supra*).

²³⁷ Schedule 3(2) of Act 65 of 1996 (*supra*).

²³⁸ See also Schedule 1(1)(a) of Act 65 of 1996 (*supra*).

²³⁹ See par 5 3 3 3 and accompanying footnotes (*infra*).

²⁴⁰ See section 25 of Act 65 of 1996 (*supra*).

not been classified by the Films and Publications Board or which has been classified as XX or X18, shall be guilty of an offence.²⁴¹ Moreover, any person who knowingly produces, imports or is in possession of a publication referred to in Schedules 1, 5, 6 or 9²⁴² or who knowingly distributes a publication which contains a visual presentation referred to in Schedules 1, 2 or 5 of the Act²⁴³ shall be guilty of an offence. Any person found guilty of a contravention of these provisions may be sentenced to a fine or to imprisonment for a period not exceeding five years, or where the court finds that aggravating factors are present, both such fine and imprisonment.²⁴⁴ If a court finds that aggravating circumstances are present and that the person is the holder of a licence to conduct an adult premises referred to in section 24 of the Films and Publications Act,²⁴⁵ the court may withdraw such licence and declare that such person shall be disqualified from obtaining another such licence for a period not exceeding twelve months.²⁴⁶

5 3 3 2 The Impact of the Films and Publications Act

Since the Films and Publications Act entered into force in June 1998, numerous films have been either prohibited from distribution and/or exhibition or restricted to adult premises registered with the Film and Publication Board. The number of films which the Film and Publication Board is expected to classify, has compelled the Board to adopt a strategy whereby up to ten films are watched during a two-hour session.²⁴⁷ The executive of the Film and Publication Board, Nana Makaula, has indicated that, had the Board not opted for this strategy, the Board would have required one thousand five hundred work days over a period of six years to watch each film from beginning to end. The financial implications would have been to the order of R 3 million.

Several films which contain scenes of explicit violent sexual conduct and explicit sexual conduct which degrades a person and which constitutes incitement to cause harm have been prohibited

²⁴¹ See section 26 of Act 65 of 1996 (*supra*).

²⁴² See section 27 of Act 65 of 1996 (*supra*). Section 27(3) expressly provides, however, that no prosecution shall be instituted in terms of section 27 without the written authority of the Attorney-General concerned.

²⁴³ See section 28 of Act 65 of 1996 (*supra*).

²⁴⁴ See section 30(1) of Act 65 of 1996 (*supra*).

²⁴⁵ See par 5 3 1 n 148 (*supra*).

²⁴⁶ See section 30(2) of Act 65 of 1996 (*supra*).

²⁴⁷ According to Makaula, only the first few minutes of film are watched, whereupon the rest of the film is fast forwarded to ascertain whether anything "unusual" occurs: see "Filmraad kyk hygflieks tien maal vinniger om by te bly" *Die Burger* May 23, 2000.

from being distributed and/or exhibited under Schedule 6(2) and 6(4) of the Films and Publications Act.²⁴⁸ Prohibitions have also occurred in terms of Schedule 6(1) of the Films and Publications Act. Films entitled *Girls of Bangkok* # 2, *More Dirty Debutantes* 78, *Skin Tight* and *Darkest Angel* attracted XX classifications and were thus prohibited from being distributed, exhibited, imported or possessed on the basis that they contain scenes of a person under the age of eighteen years participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity.²⁴⁹ But by far the majority of films scrutinised by the Film and Publication Board since the Act entered into force have been awarded X18 classifications. Numerous notices have been published in respect of films which contain scenes of explicit sexual conduct that may, in terms of section 18(4)(a)(ii) of the Films and Publications Act, only be distributed and/or exhibited by the holder of a licence of adult premises. A cross selection of film titles which have been awarded X18 classifications - and which is also indicative of the main genres of this type of material - include *Big Bust Babes* # 7, *Boobtown Brats* 2, *Deep Throat Palace*, *Lesbian Pros & Amateurs* # 17, *Twins*,²⁵⁰ *Anal Auditions* 8, *Asian Nurses*, *The Blowjob Adventures of Dr Fellation* # 8, *Dick Undercover*, *Hung Heroes* 2, *Orgasmatic*, *Shut Up and Blow Me*, *Toys, Tools and Tits* # 2,²⁵¹ *Biggest Boobs Ever*, *Black Dicks - White Chicks*, *Dripping Wet Interracial* 4, *Fuck My Black Pussy* and *White Cocks Black Pussies*.²⁵²

5 3 3 3 The Criminalisation of Hate Speech in South Africa's Age of Constitutionalism

Section 29 and Schedule 10 of the Films and Publication Act correspond with the prohibition encapsulated in section 16(2)(c) of the South African Constitution. In sharp contrast to the legislation which preceded it, the new Films and Publications Act displays a far greater sensitivity to the religious diversity of South Africans. Schedule 10 of the Films and Publications Act expressly states that a publication or film which - judged within context - *advocates hatred*

²⁴⁸ See Notice 1603 published in *Government Gazette* No 19576 December 4, 1998. Film titles included *Evil Man*, *Real People Real Bonfage*, *Head Trip* and *Reluctant Bondage Date*.

²⁴⁹ See Notice 1604 and Notice 1606 published in *Government Gazette* No 19576 December 4, 1998. For examples of other films which were classified XX in terms of either Schedule 6 (2) or 6(4) of Act 65 of 1996 (*supra*), see Notice 1572, Notice 1573 and Notice 1574 *Government Gazette* No 19576 (*supra*).

²⁵⁰ See Notice 1607 published in *Government Gazette* No 19576 (*supra*).

²⁵¹ See Notice 1608 published in *Government Gazette* No 19576 (*supra*).

²⁵² See Notice 1571 published in *Government Gazette* No 19576 (*supra*). For numerous other examples of film titles of this genre, see also Notice 1663 published in *Government Gazette* No 19611 December 14, 1998.

that is based on religion, and that constitutes incitement to cause harm, shall be classified as XX.²⁵³ Section 29 of the Act is likewise directed at the advocacy of war, violence and hatred in a publication or film. Section 29(1) and (2) provide that any person who knowingly distributes a publication or knowingly broadcasts, exhibits in public or distributes a film which - judged within context - amounts to propaganda for war,²⁵⁴ incites to imminent violence,²⁵⁵ or advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm,²⁵⁶ shall be guilty of an offence. The same prohibition applies to any public entertainment or play.²⁵⁷

As in the case of Schedule 10, section 29(1) - (3) does not apply to a *bona fide* scientific, documentary, dramatic, artistic, literary or religious publication or film, entertainment or play,²⁵⁸ or a publication, film, entertainment or play which amounts to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience,²⁵⁹ or a publication, film, entertainment or play which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.²⁶⁰ A person shall not be convicted of a contravention of incitement to imminent violence,²⁶¹ unless the state proves that the Film and Publication Board has not made a finding in terms of Schedule 1 (read with Schedule 5) or Schedule 6 (read with Schedule 9).²⁶² Of specific importance is section 29(6)(c) of the Act which provides that a person shall not be convicted of a contravention of the advocacy of hatred that is based on gender, and which constitutes incitement to cause harm, unless the state proves that the Film and Publication Board

²⁵³ This provision shall not, however, apply to a *bona fide* scientific, documentary, dramatic, artistic, literary or religious publication or film (or any part thereof) which - judged within context - is of such a nature: see Schedule 10(2)(a) of Act 65 of 1996 (*supra*). A publication or film which amounts to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience or on a matter of public interest is also exempted: see Schedule 10(2)(b) and 10(2)(c) of Act 65 of 1996 (*supra*).

²⁵⁴ See sections 29(1)(a) and 29(2)(a) of Act 65 of 1996 (*supra*).

²⁵⁵ See sections 29(1)(b) and 29(2)(b) of Act 65 of 1996 (*supra*).

²⁵⁶ See sections 29(1)(c) and 29(2)(c) of Act 65 of 1996 (*supra*).

²⁵⁷ See section 29(3)(a) - (c) of Act 65 of 1996 (*supra*).

²⁵⁸ See section 29(4)(a) of Act 65 of 1996 (*supra*).

²⁵⁹ See section 19(4)(b) of Act 65 of 1996 (*supra*).

²⁶⁰ See section 29(4)(c) of Act 65 of 1996 (*supra*).

²⁶¹ See section 19(1)(b) and 29(2)(b) of Act 65 of 1996 (*supra*).

²⁶² See section 29(6)(a) of Act 65 of 1996 (*supra*). See also par 5 3 3 1 and accompanying footnotes (*supra*).

has not made a finding in terms of Schedule 1 (read with Schedule 5) or Schedule 6 (read with Schedule 9).²⁶³

Any person found guilty of a contravention of section 29 of the Films and Publications Act may be sentenced to a fine or to imprisonment for a period not exceeding five years, or where the court finds that aggravating factors are predominant, both such fine and such imprisonment.²⁶⁴ If the person so convicted is the holder of a licence to conduct adult premises in terms of section 24 of the Act,²⁶⁵ the court may withdraw such licence if aggravating circumstances are present and disqualify such person from obtaining another such licence for a period not exceeding twelve months.²⁶⁶

As indicated earlier in this chapter,²⁶⁷ I shall now proceed to consider the first - and to date only - decision of the South African Constitutional Court in which the constitutional implications of the Indecent or Obscene Photographic Matter Act of 1967 were assessed.

5 4 THE CONSTITUTIONAL IMPLICATIONS OF INDECENCY, OBSCENITY AND OFFENSIVENESS: *CASE; CURTIS V MINISTER OF SAFETY AND SECURITY*²⁶⁸

5 4 1 The Facts in *Case; Curtis v Minister of Safety and Security*

Case; Curtis v Minister of Safety and Security concerned the simultaneous adjudication of the matters of Patrick and Inge Case²⁶⁹ and Stephen Roy Curtis²⁷⁰ who had been arraigned before the Randburg Magistrates' Court on charges of possession of sexually explicit video material in

²⁶³ The same exception applies to the advocacy of hatred based on religion. In such an instance, section 19(6)(c) of Act 65 of 1996 (*supra*) provides that the state must prove that the Film and Publication Board has not made a finding in terms of Schedule 10 of the Act. See also par 5 3 3 1 and accompanying footnotes (*supra*)

²⁶⁴ See section 30(1) of Act 65 of 1996 (*supra*).

²⁶⁵ See par 5 3 1 n 148 (*supra*).

²⁶⁶ See section 30(2) of Act 65 of 1996 (*supra*).

²⁶⁷ See par 5 2 5 n 130 (*supra*).

²⁶⁸ 1996 (5) BCLR 609 (CC).

²⁶⁹ Case No CCT 20/95.

²⁷⁰ Case No CCT 21/95.

contravention of section 2(1) of the Indecent or Obscene Photographic Matter Act.²⁷¹ The material in the possession of the Case applicants were seized, together with various items of video-playback and recording equipment, by the South African police in the course of a raid on the Cases' residence in Sandton, Johannesburg. The video cassettes in the possession of Curtis were seized from the applicant in a police operation conducted in a shopping centre parking lot in Northgate, Johannesburg. The Case applicants made their first appearance in the Randburg Magistrates' Court in February 1995. After a number of further appearances, an application was lodged in terms of section 103(3) of the Interim Constitution for the proceedings to be postponed, pending an application to the Supreme Court regarding the constitutional status of section 2(1) of the Indecent or Obscene Photographic Matter Act. The application was granted, proceedings in the Magistrates' Court were suspended and subsequently referred to the Witwatersrand Local Division of the Supreme Court. In appearing before Schabert J, the Case applicants entered a motion to have the matter referred to the Constitutional Court in terms of section 103(4) of the Interim Constitution on the basis that section 2(1) of the Indecent or Obscene Photographic Matter Act was inconsistent with sections 8,²⁷² 13,²⁷³ 14(1),²⁷⁴ 15,²⁷⁵ 24²⁷⁶ and 33(1)²⁷⁷ of the Constitution. This motion was granted and the matter duly referred. Proceedings against Curtis followed a parallel route to the Constitutional Court and the two cases were heard together by the Constitutional Court in September 1995.

5 4 2 The Decision of the South African Constitutional Court

In a judgment of less than three pages, the majority of the Constitutional Court²⁷⁸ held that any

²⁷¹ Act 37 of 1967 (*supra*). The charges were based on the possession by Patrick and Inge Case of some one hundred and fifty video cassettes containing sexually explicit matter and by Stephen Roy Curtis of five similar cassettes.

²⁷² Section 8 of Act 200 of 1993 (*supra*) entrenched the right to equality.

²⁷³ Section 13 of Act 200 of 1993 (*supra*) entrenched the right to privacy.

²⁷⁴ Section 14(1) of Act 200 of 1993 (*supra*) entrenched the right to freedom of conscience.

²⁷⁵ Section 15 of Act 200 of 1993 (*supra*) entrenched the right to freedom of speech, expression and artistic creativity.

²⁷⁶ Section 24 of Act 200 of 1993 (*supra*) entrenched administrative justice.

²⁷⁷ Section 33(1) of Act 200 of 1993 (*supra*) set out the permissible limitations of the fundamental rights and freedoms entrenched under Chapter 3 of the Interim Constitution.

²⁷⁸ *Per* Didcott J at 646 - 648 (*supra*); Chaskalson P, Mahomed DP, Ackermann J, Kriegler J, O'Regan J and Ngophe AJ concurring. For a basic discussion of the Constitutional Court's decision, see Nicholas Smith "Policing

ban on the possession of "erotic material" for the solitary purpose of personal use invaded the right to privacy guaranteed under section 13 of the Interim Constitution. In the words of Didcott J, "[w]hat erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine ... [i]t is certainly not the business of society or the State."²⁷⁹ In the present instance, the majority of the court found that the invasion of personal privacy was aggravated by the "preposterous definition"²⁸⁰ of indecent or obscene photographic matter contained in section 1 of the Indecent or Obscene Photographic Matter Act which read:

"[i]ndecent or obscene matter includes photographic matter²⁸¹ or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature."²⁸²

The wide ambit of section 1 led the majority of the Constitutional Court to conclude that its scope inevitably also covered "reproductions of not a few famous works of art, ancient and modern, that are publicly displayed and can readily be viewed in major galleries of the world."²⁸³ The court therefore found it indisputable that section 2(1) of the Indecent or Obscene Photographic Matter Act was in conflict with section 13 of the Interim Constitution. On the question whether section 2(1) of the Act was also incompatible with the right to freedom of expression guaranteed under section 15 of the Interim Constitution, the applicants argued that the protection afforded by section 15 was not confined to the conveyance of information and the expression of ideas by verbal, pictorial or other means. They maintained that the right to freedom

Pornography: Cases and Comments" 1997 13(2) *SAJHR* 292 - 303.

²⁷⁹ At 647 (*supra*). In a separate judgment at 649 (*supra*), Langa J interpreted Didcott J's statement to be subject to the qualification that the right of privacy - as is the case with other rights - is not necessarily exempt from limitation. In Langa J's view, the possibility that the limitation may extend to possession of erotic material even in the privacy of one's home is indeed acknowledged by Didcott J in his judgment.

²⁸⁰ *Per* Didcott J at 647 (*supra*). According to Langa J at 649 (*supra*), the emphasis with which Didcott J expressed himself with regard to the individual's right to privacy had to be seen against the backdrop of "[South Africa's] history and the fact that constitutional protection of this right is new in this country."

²⁸¹ "Photographic matter" was defined in Act 37 of 1967 (*supra*) as "including any photograph, photogravure and cinematograph film, and any pictorial representation intended for exhibition through the medium of a mechanical device."

²⁸² Compare these criteria with the grounds listed in section 6(1)(c) of the Publications and Entertainments Act 26 of 1963: see par 5 2 3 n 66 (*supra*).

²⁸³ *Per* Didcott J at 647 (*supra*).

of expression also encompassed the reception of ideas and information by those to whom they are communicated or presented. The majority of the Constitutional Court refused, however, to accept that freedom of expression encompassed this extra dimension "in its literal or ordinary sense," but added that the court may well be persuaded to subscribe to this argument "on some future occasion that called for a decision on this point."²⁸⁴ This question should thus "in the meantime ... be left open" because once a violation of section 13 has been established, "there is no need to consider any alternative attack on section 2(1) of the Indecent or Obscene Photographic Matter Act."²⁸⁵

The only issue that remained to be considered was whether section 33(1) of the Interim Constitution saved the prohibition contained in section 2(1) of the Act from nullification. Section 33 of the Interim Constitution - which contained a general limitation clause²⁸⁶ - provided, *inter alia*, that the rights entrenched in the Bill of Rights may be limited by law of general application, provided that such limitation shall be permissible only to the extent that it is "reasonable"²⁸⁷ and "justifiable in an open and democratic society based upon freedom and equality."²⁸⁸ The majority of the Constitutional Court found this not to be the case in respect of section 2(1) of the Indecent or Obscene Photographic Matter Act. Without alluding to - or seeking to balance - the various interests at stake, the majority of the court concluded that the intrusion into personal privacy that resulted from the prohibition contained in section 2(1) of the Act was neither reasonable nor justifiable.²⁸⁹

Having found that section 2(1) of the Indecent or Obscene Photographic Matter Act infringed section 13 of the Interim Constitution and that this infringement was neither a reasonable nor justifiable limitation on the right to privacy, the majority of the Constitutional Court directed their attention to the submission made by several *amici curiae* in respect of the present proceedings. People Opposing Women Abuse (POWA), the NICRO Women's Support Centre, the Advice Desk for Abused Women, Rape Crisis (Cape Town), the NISAA Institute for

²⁸⁴ At 647 (*supra*).

²⁸⁵ At 647 (*supra*).

²⁸⁶ Now section 36 of Act 108 of 1996 (*supra*).

²⁸⁷ See section 33(1)(a)(i) of Act 200 of 1993 (*supra*).

²⁸⁸ See section 33(1)(a)(ii) of Act 200 of 1993 (*supra*).

²⁸⁹ *Per* Didcott J at 647 (*supra*).

Women's Development and Women Against Women Abuse (WAWA) submitted a single brief²⁹⁰ on the impact of sexually explicit material on the lives of women and the exploitation of women and children in and through pornography. On the question whether violent forms of pornography have an impact on the incidence of sexual crimes against women, the majority of the Constitutional Court furnished a standard response and maintained that "the results of the research that was drawn to our attention neither prove nor disprove it empirically."²⁹¹ Yet in the very same paragraph, the majority of the Constitutional Court observed that

"[t]he production of pictures like those, and of further types equally depraved, is certainly an evil and *may well deserve to be suppressed*. Perhaps, as a means to that end, *the same even goes for their possession*, making it both reasonable and justifiable for society to mind the private business of its members. Such questions do not arise at present and are best left unanswered until some future case confronts us with them."²⁹²

The majority concluded its assessment by observing that the court should in the present instance avoid "run[ning] the risk of fettering ourselves with premature decisions on important and contentious questions which have implications for future adjudication that are hard to foresee now ... the less we say meanwhile, in short, the better that will be in the long run."²⁹³ Section 2(1) of the Indecent or Obscene Photographic Matter Act was therefore found to be neither compatible with, nor to constitute a reasonable and justifiable limitation on the right to privacy guaranteed under section 13 of the Interim Constitution. The provision was accordingly struck down.

By contrast, Mokgoro J - in a separate judgment of more than thirty pages - embarked on what at first glance appeared to be a comprehensive examination of the matter at hand. She commenced her assessment by first tracing the history of obscenity law in South Africa as backdrop to the Indecent or Obscene Photographic Matter Act and its legislative objective.²⁹⁴ She rightly argued that the 1967 Act had been aimed at maintaining the moral character of a supposedly homogenous society build on Christian values.²⁹⁵ To this end, Parliament had cast

²⁹⁰ This *amici curiae* brief was prepared by Joanne Fedler of the Centre of Applied Legal Studies at the University of the Witwatersrand. Oral argument on behalf of the *amici curiae* was heard by the Constitutional Court on September 5, 1995.

²⁹¹ At 647 (*supra*).

²⁹² At 648 (*supra*). My emphasis.

²⁹³ At 648 (*supra*).

²⁹⁴ At 614 - 619 (*supra*).

²⁹⁵ See also my discussion of the Publications Act 42 of 1974 (*supra*) in par 5.2.5 and accompanying footnotes (*supra*).

its proscriptive net as wide as possible by means of the definition contained in section 1 of the Act. She pointed out, however, that under the new constitutional dispensation, only legislation which conforms to the norms set by the Interim Constitution could be enacted and enforced. But since it is not the role of the judiciary to recast the definition contained in section 2(1) of the Act, Mokgoro J argued that the task of the Constitutional Court in the present instance was to consider whether it was possible to save the provisions of the Act by restrictive interpretation.

Turning to assess the contention by the applicants that the definition of indecent or obscene matter contained in the Act constituted an unreasonable and unjustifiable limitation on the right to freedom of expression, Mokgoro J - in sharp contrast to the path followed by the majority of the court - set about to ascertain whether sexually explicit material was a category of expression protected under section 15 of the Interim Constitution and, if found to be the case, whether the possession of such material was subject to protection under this section of the Constitution.²⁹⁶ She argued that it was not to be simply *assumed* that the Interim Constitution protected sexually explicit material. In the United States, for example, it is settled law that so-called obscene material is denied protection under the First Amendment to the Constitution.²⁹⁷ But in light of the general limitation clause contained in section 33 of the Interim Constitution, Mokgoro J argued that the better course of action as far as South African constitutional law is concerned would be to define the right to freedom of expression generously so as to also include "non-political expression".²⁹⁸ She found support for this approach in the wording of section 33 of the Constitution. Section 33(1)(a)(bb) expressly provided that any limitation to certain rights - including the right guaranteed under section 15 - must, in addition to being reasonable and justifiable, be *necessary* in so far as such right relates "to free and fair political activity." On the face of it, Mokgoro J argued, section 15 protected expression only and not the right to receive material generated and expressed by others.²⁹⁹ However, one's freedom of expression would be impoverished if it did not also embrace the right to receive, hold and consume expressions generated by others.³⁰⁰ A survey of comparable case law on this issue³⁰¹ impelled Mokgoro J to

²⁹⁶ At 619 - 631 (*supra*).

²⁹⁷ For a comprehensive discussion and critique of the approach adopted by United States courts in respect of sexually explicit material, see Chapter 3 of this dissertation par 3 4 and accompanying footnotes (*supra*).

²⁹⁸ At 619 (*supra*). For more on generous interpretation as hermeneutical guideline for constitutional interpretation, see Chapter 1 of this dissertation par 1 3, especially par 1 3 1 3 and accompanying footnotes (*supra*).

²⁹⁹ At 619 - 621 (*supra*).

³⁰⁰ At 622 - 624 (*supra*).

³⁰¹ At 624 - 625 (*supra*).

conclude that so-called "sexually expressive speech" was subject to the protection of section 15 of the Interim Constitution and that such protection must necessarily extend to the right to possess sexually explicit material.³⁰²

The final issue that Mokgoro J had to address was whether the limitation imposed on free expression by the Indecent or Obscene Photographic Matter Act satisfied the requirements of section 33 of the Interim Constitution. To this end, she considered the different approaches followed by the Supreme Court of the United States and Canada to determine the scope of sexually explicit material that would enjoy constitutional protection.³⁰³ She noted that the United States Supreme Court has adopted three basic guidelines³⁰⁴ to assess when sexually explicit material might be subject to state regulation and that the application of the third leg of the test enunciated in *Miller v California*³⁰⁵ - namely whether the work taken as a whole lacked serious literary, artistic, political or scientific value³⁰⁶ - has proved to be especially troublesome.³⁰⁷ Mokgoro J pointed out that by contrast, the Canadian Supreme Court³⁰⁸ had discarded the moralistic basis which underpins United States obscenity jurisprudence in favour of a standard based on the harm to society engendered in the form of gender violence or the reinforcement of gender stereotypes by certain categories of sexually explicit material.³⁰⁹ Yet after devoting ten pages of her judgment to a comparative analysis of United States and Canadian jurisprudence, Mokgoro J conceded that although the Canadian approach might be "more promising to follow",³¹⁰ it was not necessary for the Constitutional Court to adopt either approach in the present instance. If the impugned provisions of the Indecent or Obscene Photographic Matter Act were found to be overbroad, it would be possible to resolve the matter without assuming the

³⁰² At 626 (*supra*).

³⁰³ At 626 - 631 (*supra*).

³⁰⁴ For a comprehensive discussion and critique of the standard of obscenity employed by the United States Supreme Court, see Chapter 3 of this dissertation par 3 3 5 - par 3 3 6 and par 3 4 1 - par 3 4 4 and accompanying footnotes (*supra*).

³⁰⁵ 413 US 15 (1973).

³⁰⁶ At 24 (*supra*).

³⁰⁷ At 626 - 628 (*supra*).

³⁰⁸ In *Regina v Butler* [1992] 89 4th DLR 409. For a comprehensive discussion and critique of this landmark decision of the Supreme Court of Canada, see Chapter 4 of this dissertation par 4 3 5 and accompanying footnotes (*supra*).

³⁰⁹ At 628 - 631 (*supra*).

³¹⁰ At 631 (*supra*).

“formidably difficult task of drawing lines between different kinds of sexually explicit speech which was in any event the primary task of the legislature.”³¹¹ An examination of the definition of indecent or obscene matter revealed that section 2(1) of the Act was indeed overbroad and consequently included in its compass a vast array of “incontestably constitutionally protected categories of expression.”³¹² Mokgoro J thus found that the means adopted to proscribe sexually explicit material were entirely disproportionate to whatever constitutionally permissible objectives might underlie the Act. The means were therefore not reasonable within the meaning of section 33(1)(a)(i) of the Interim Constitution. And since section 2(1) of the Indecent or Obscene Photographic Matter Act could not be saved by severance³¹³ or by reading down,³¹⁴ Mokgoro J found this provision to be inconsistent with the Interim Constitution.³¹⁵ In conclusion, she agreed with the view expressed in the judgment of Didcott J that the Indecent or Obscene Photographic Matter Act unreasonably and unjustifiably infringed the right to privacy, but felt it necessary to support the *caveat* expressed by Langa J³¹⁶ and Madala J³¹⁷ that the state might under certain circumstances regulate the kinds of expressive material an individual might possess in the privacy of his home.³¹⁸

5 4 3 A Critical Assessment of the Decision of the South African Constitutional Court in *Case; Curtis v Minister of Safety and Security*

A reading of the first decision of the South African Constitutional Court on pornography leaves the distinct impression that, apart from Mokgoro J, the remaining ten judges³¹⁹ endeavoured to reveal as little as possible about their (constitutional) stance on - and conception of - this vexing

³¹¹ At 632 (*supra*).

³¹² At 636 (*supra*).

³¹³ At 639 - 641 (*supra*).

³¹⁴ At 641 - 643 (*supra*).

³¹⁵ At 646 (*supra*).

³¹⁶ At 649 - 650 (*supra*).

³¹⁷ At 651 (*supra*).

³¹⁸ At 638 (*supra*). See also par 5 4 2 n 278 and n 279 (*supra*).

³¹⁹ With the exception of Sachs J at 652 (*supra*) who commenced his (separate) judgment by conceding that “[m]r Justice Potter Stewart might have known obscenity when he saw it, but with respect, I do not, nor would I lay claim to any intuitive and immediate recognition of what is indecent. I am sure that the great majority of South African judicial officers, not to speak of the police and prosecuting authorities, or of the general public, are in the same position.”

issue. Although Didcott J (who delivered the majority decision of the court) was swift to point out that, once it had been determined that section 2(1) of the Indecent or Obscene Photographic Matter Act violated the right to privacy under the Interim Constitution, the issue whether pornography constitutes (constitutionally protected) speech no longer needs to be decided, his treatment of pornography points toward a distinctly libertarian understanding of the matter.

The Constitutional Court's treatment of the issues engendered by pornography raises three pressing concerns. These concerns relate to the fact that the Constitutional Court elected to frame the matter at hand as a right to privacy issue, that the court shied away from proposing a working definition of pornography and that the majority of the court appear decidedly ambivalent on a number of occasions in the course of its assessment of pornography. I shall now consider each of these concerns in turn.

5 4 3 1 The Right to Privacy as a Constitutional Priority

Three (interrelated) problems arise from the fact that the Constitutional Court found that section 2(1) of the Indecent or Obscene Photographic Matter Act violated the right to privacy guaranteed in section 13 of the Interim Constitution. The first problem pertains to the precise meaning of the words "erotic material" employed by the majority of the court. Since the majority found that such material enjoys protection under the Bill of Rights in the Interim Constitution, it is of obvious importance to discover the basis on which the court distinguishes "erotic" material from other sexually explicit material. Although the term "erotica" bears a distinct meaning within radical feminist thinking,³²⁰ the Constitutional Court failed to indicate whether it subscribes to this or any other particular conception of erotica. Radical feminism distinguishes between erotica and pornography on the basis that the former bears three key characteristics which are distinctly absent from the latter. Erotic material - although sexually explicit - does not subjugate women in its production or message, does not involve coercion in its production, message or use and is devoid of any imminent or actual violence as well as threats of violence. Since the majority of the Constitutional Court refused to entertain the radical feminist argument (presented by several *amici curiae*)³²¹ that some link (or correlation) exists between acts of sexual violence against women and violent sexually explicit images, one cannot simply assume that the court subscribes to - and thereby endorses - the radical feminist conception of erotica.

The second difficulty which arises stems from the Constitutional Court's decision to prioritise the right to privacy. By following this course of action, the court - by implication - framed its constitutional argument within a libertarian paradigm. As a consequence, the constitutionality

³²⁰ See par 5 5, especially par 5 5 2 and accompanying footnotes (*infra*).

³²¹ See par 5 4 2 n 290 (*supra*).

of section 2(1) of the Indecent or Obscene Photographic Matter Act was assessed against the constitutional rights and interests of the individual. This course of action bears the following constitutional consequences. First, the autonomy, freedom and inviolability of the individual are prioritised as absolute constitutional values at the expense of other fundamental values, notably equality and dignity. Secondly, by employing a libertarian framework, the Constitutional Court assumes that the distinction typically drawn between the public and private sphere is valid. I argued in Chapter 2 of this dissertation that, as a political theory, even liberal feminism struggles to conceive of the possibility that the private sphere may be an institution that oppresses and exploits women physically, emotionally and sexually.³²² And since liberal feminism cannot conceptualise the ways in which sexuality and sexual experiences may be related to the dominant structures of patriarchal power, domestic violence is rendered invisible, rape becomes an unfortunate (and random) personal experience and sexual activity - including family planning, reproduction and the use of sexually explicit material - are simply matters of individual, private choice. The liberal concept of a private area of life free from power struggle and political interference is indeed far removed from a position which emanates from the understanding that all existing social institutions and relationships - whether private or public - are part of a (patriarchal) power struggle. By electing to prioritise the right of the individual to do whatever he may wish in the privacy of his home, the Constitutional Court fails dismally to appreciate that both the private and public sphere are seats of women's oppression. The observation of Sachs J to the effect that "[i]t seems strange that what one can do in the privacy of one's bedroom one cannot look at in one's bedroom" seems to proceed from the assumption that the private domain is indeed one place where women do not (often) suffer horrific subordination. Although no official statistics exist in regard to the incidence of domestic violence by virtue of the moratorium on crime statistics,³²³ it is roughly estimated that eighty percent of all women in South Africa are subject to some form of abuse within relationships.³²⁴ Yet the Constitutional Court chose to overlook the reality of rape, sexual assault and battery which South African women face in their homes and elected not only to award constitutional protection to material which implicate

³²² See Chapter 2 of this dissertation par 2 3 2, especially par 2 3 2 5 and accompanying footnotes (*supra*).

³²³ The moratorium on the publication of crime statistics was lifted after one year on May 31, 2001. Comparative sexual assault and rape statistics released by government in respect of the first three months from 1994 - 2001 revealed a four percent increase: see "Misdaad bestendig, sê Tshwete" *Die Burger* June 1, 2001 and "Ban lifted but little to cheer in statistics" *Cape Times* June 1, 2001.

³²⁴ This constitutes a twenty percent increase from statistics released by the NICRO Women's Support Centre (Cape Town) in April 1994. During this period, the Centre received a total of 3074 calls which excluded face-to-face counselling. See also, in general, "Syfers oor geweld teen vroue skok" *Die Burger* November 25, 2000.

women's sexuality, but to also condone the presence of such material in the bedroom. The Constitutional Court's reasoning seems premised on the assumption that men and women both value privacy. But this assumption fails to explain, as Lorene Clark so eloquently argues,

"[w]hy the demand for privacy [has] centered so exclusively on preserving the traditional domain of male privilege ... [a]nd why the staunchest defenders of that view fail to see that in invoking these principles within a domain characterized by fundamental sexual inequality they are in fact reinforcing that inequality and sanctioning its worst abuses."³²⁵

The final aspect of the court's treatment of pornography as a right to privacy issue which I find problematic relates to the fact that the court - in so doing - conveniently side stepped the other constitutional issues raised by the applicants. Although Mokgoro J indeed ventured to conceptualise sexually explicit material as a mode of expression,³²⁶ the majority of the Constitutional Court found it unnecessary to assess how section 2(1) of the Indecent or Obscene Photographic Matter Act relates to the issues of freedom of expression, equality, freedom of conscience and fair administrative action. The majority of the court thus effectively side stepped those issues in relation to pornography that are arguably most in need of constitutional interpretation and assessment in South African law.

5 4 3 2 The Constitutional Court's Conception of Pornography

Apart from Mokgoro J who conceptualised pornography as "sexually explicit expression"³²⁷ and "sexually expressive speech",³²⁸ the majority of the Constitutional Court refrained from proposing a (working) definition of pornography. Yet the conclusion reached by the majority of the court in respect of the constitutionality of section 2(1) of the Indecent or Obscene Photographic Matter Act implies that the court must have employed *some* conception of pornography. The terminology employed by Didcott J provides definite clues. Words such as "repulsive behaviour",³²⁹ "evil", "depraved", "obnoxious" and "unbearably vile pictures"³³⁰ point towards a moralistic understanding and condemnation of pornography. A moralistic condemnation of pornography is problematic for at least two reasons. First, as my assessment

³²⁵ See "Liberalism and Pornography" in W Copp (ed) *Pornography and Censorship* (1983) at 50.

³²⁶ At 626 (*supra*).

³²⁷ At 619 (*supra*).

³²⁸ At 626 (*supra*).

³²⁹ At 647 (*supra*).

³³⁰ At 648 (*supra*).

of the obscenity jurisprudence of the United States Supreme Court in Chapter 3 has shown,³³¹ a moralistic condemnation is usually premised on a conception of pornography as a mode of expression which appeals to the prurient interest and which must be assessed on the basis of the likes and dislikes of the average person in relation to (contemporary) community standards. Secondly, I also argued at length³³² that since it is not the primary objective of a moralistic condemnation of pornography to secure the legal, social and political advancement of women, a moralistic understanding of the matter is ill suited to frame adult heterosexual pornography as an infringement of women's constitutional interests in equality, dignity and physical integrity. The Constitutional Court's train of thought does not bode well for South African law and women, in particular, have reason for concern should the court persist in treating pornography in relation to the degree of repugnance or aversion that it is thought to engender.

5 4 3 3 Traces of Ambivalence in the Constitutional Court's Assessment of Pornography

In its assessment of the constitutionality of section 2(1) of the Indecent or Obscene Photographic Matter Act, the majority of the Constitutional Court displays a measure of ambivalence on at least two occasions. The first trace of ambivalence is detectable where the court refused to accept the results of research which purport to show a link between violent forms of pornography and the incidence of sexual crimes against women. Although the court dismissed the results of the research as inconclusive, the majority of the court - in the very same paragraph - nevertheless conceded that the production of "pictures like those, and of further types equally depraved, is certainly an evil and may well deserve to be suppressed."³³³ Moreover, the bold declaration to the effect that "[w]hat erotic material I may choose to keep within the privacy of my home ... is nobody's business but mine",³³⁴ is somewhat perplexing when juxtaposed with the statement "[p]erhaps, as a means to an end" it may be "both reasonable and justifiable for society to mind the private business of its members."³³⁵ These forceful - yet contradictory - statements by Didcott J not surprisingly prompted Langa J and Madala J to qualify their learned colleague's (apparently all-encompassing) interpretation of the right to privacy. A second instance of ambivalence in the Constitutional Court's assessment is revealed when the majority - on the one hand - views the matter as one of "fettering ourselves with premature decisions," yet - at the same time - declares

³³¹ See Chapter 3 of this dissertation par 3 4 and accompanying footnotes (*supra*).

³³² See Chapter 3 of this dissertation par 3 6 2 and accompanying footnotes (*supra*).

³³³ At 648 (*supra*).

³³⁴ At 647 (*supra*).

³³⁵ At 648 (*supra*).

pornography an "important and contentious issue." If the majority of the court truly conceived of the matter as important, why then the (almost blunt) refusal to address it? Even if one were to accept the Constitutional Court's argument regarding the premature nature of the question, an *obiter dictum* on the matter would have been welcomed as opposed to what could be seen as the court's rather indifferent treatment of pornography and thereby - by implication - the constitutional stake of women to secure an end to all practices of gender discrimination.

5 5 A SUITABLE CONCEPTION OF HARM AND LEGAL DEFINITION OF ADULT HETEROSEXUAL PORNOGRAPHY FOR SOUTH AFRICAN CONSTITUTIONAL LAW

I shall - in what follows below - first set out the manner in which I believe South African courts ought to conceptualise the harm of pornography, whereafter I shall propose a (legal) definition of adult heterosexual pornography which can facilitate a constitutional assessment of pornography either as a patriarchal structure that impacts on women's rights to equality, dignity and physical integrity or as a mode of speech which incites gender hatred.

5 5 1 A Suitable Conception of the Harm of Adult Heterosexual Pornography

Any attempt to conceptualise the harm of adult heterosexual pornography must be gender-specific and proceed from a proper appreciation of our social context. The social reality of South African women accentuates that the context within which the constitutional implications of adult heterosexual pornography must be decided is not exclusively that of a history of oppressive conservatism. South Africa's history of racial and gender oppressive inequality also created a climate in which social evils - notably violence against women - could flourish. The law accordingly needs to appreciate that we live in a patriarchal society which produces, functions and is indeed sustained by an imbalance of power between men and women. This, in turn, must lead to an acknowledgement that the power imbalance between the sexes finds expression in institutionalised inequality, domination, sexism and violence. Because these are the conditions that shape our social organisation, the law must respond to all structures that are related to women's state of inequality and subordination. Adult heterosexual pornography - together with prostitution and sexual violence - are all structures which implicate and indeed shape women's very sexual identity. And since pornography is pervasive, inescapable and public, it becomes a relevant factor in the continued sexism and sexual violence to which women are subjected under conditions of male dominance.

The law accordingly needs to investigate the role of pornography in the construction of powerful subject positions through which women lead their lives, the role of pornography in the creation and reinforcement of male dominance and female subordination, the possible correlation between

pornography and instances of sexual violence against women and the role that pornography plays in placing women in a disempowered state of sexual submission and servility. Only once these socio-political conditions are recognised, it will become possible to articulate an accurate (legal) conception of the harm of pornography. Only once the harm of pornography is expressed in relation to the actual socio-political conditions of women, the dehumanisation of women in a culturally-specific and empirically-descriptive sense will be revealed. The law will then be in a position to respond to the fact that pornography deprives women of the power to determine their sexual identity and that pornography purports to define what a woman is - on a group as well as an individual basis.

5 5 2 A Legal Definition of Adult Heterosexual Pornography for South African Law

Having conducted a critical assessment in the two preceding chapters of this dissertation of the conceptions of pornography that are employed in United States and Canadian constitutional jurisprudence and mindful of the two distinct feminist paradigms which I have elected to employ in the present study, I propose two legal definitions of adult heterosexual pornography that are constructed around certain key elements or components. These components have acquired a distinct meaning both in radical and liberal feminist scholarship.

In order to be true to the aspirations of radical feminist thinking as well as to remain within the scope and object of the present study, the first definition of adult heterosexual pornography must be decidedly gender-specific. Only a gender-specific definition has the potential to facilitate a woman-centred analysis of pornography and articulate the impact of pornography on women's sexual identity, autonomy and status. A suitable definition of adult heterosexual pornography must avoid any reference to sexual arousal or prurience for, as I have indicated in Chapter three of this dissertation,³³⁶ there is a vast array of material - ranging from advertisements for underwear to gynaecological reference works - which is bound to be sexually arousing to at least someone. A definition must neither be dependant on the tastes and attitudes of the average person, nor on the level of sexual explicitness, degradation or violence which a community may or may not be prepared to tolerate, particularly since the latter fluctuates within sexist and heterosexist parameters. A conception of pornography which attempts to determine the level of tolerance of sexual violence, objectification or degradation in a community is not only difficult to give practical effect to, but is also potentially dangerous in a society such as South Africa which is saturated with reports of sexual violence and brutality against women. As a consequence, a definition must refrain from constituting a moralistic condemnation of

³³⁶

See Chapter 3 of this dissertation par 3 4 4, especially par 3 4 4 1 and accompanying footnotes (*supra*).

pornography, but must rather be capable of facilitating a constitutional analysis of pornography which is sensitive to issues pertaining to women's interests in equality, dignity and physical integrity. This means that a definition of adult heterosexual pornography must not merely seek to proscribe violent or degrading sexually explicit material as the Supreme Court of Canada and the Films and Publications Act have elected to do. I argued before³³⁷ that a suitable conception of the harm of pornography recognises that all pornography is potentially problematic because all pornography implicates women's sexuality and therefore their very identity. And since all adult heterosexual pornography - whether labelled "hard core",³³⁸ "soft porn" or "violent and degrading"³³⁹ - objectifies women as a class, all pornography can invoke constitutional scrutiny, on condition that its harm is suitably articulated. A (legal) definition of pornography must therefore duly appreciate that the power imbalance which stands central to pornography is both driven and sustained by patriarchal conceptions of (female) sexuality.³⁴⁰

The first definition of adult heterosexual pornography is therefore premised on an understanding of pornography as a patriarchal practice of gender-specific dominance and subordination. My proposed definition reads as follows:

³³⁷ See par 5 5 1 and accompanying footnotes (*supra*).

³³⁸ This term was used by the Supreme Court of the United States in *Miller v California* at 18 n 2 (*supra*).

³³⁹ This genre of pornography has been identified by the Supreme Court of Canada in *Regina v Butler* at 470 (*supra*) and forms the crux of Schedules 1 and 6 of the Films and Publications Act 65 of 1996 (*supra*).

³⁴⁰ In fact, in a male dominated society, adult heterosexual pornography cannot achieve its political objective without the presence of a distinct power imbalance. It is therefore imperative that a definition of pornography must seek to assess its constitutional harm in relation to the very real power relations at play and their often extreme consequences. By accentuating the unequal power relations that stand central to pornography, radical feminism indeed has the potential to embrace a *wider* conception of pornography and its harm than the one I have opted for in this study. Implicit in the radical feminist contention that all pornography compromises women's fundamental rights, is the argument that pornography is constitutionally problematic because it targets a historically marginalised or vulnerable group. Within such an analytical framework, the constitutional implications of pornography can therefore also be explored in relation to *other* socially or historically marginalised groups or categories of persons, notably gays, lesbians or transsexuals. In their ordinances for the city councils of Minneapolis and Indianapolis, Andrea Dworkin and Catharine MacKinnon indeed understood this and expressly conceptualised pornography and its harm in relation to their impact on historically marginalised categories of persons: see Chapter 3 of this dissertation par 3 5, especially par 3 5 1 1 - 3 5 1 2 and accompanying footnotes (*supra*).

Adult³⁴¹ heterosexual³⁴² pornography³⁴³ is the graphic, sexually explicit representation³⁴⁴ of women³⁴⁵ within a context³⁴⁶ of unequal gender power relations, subordination,³⁴⁷ objectification,³⁴⁸ degradation, dehumanisation or sexualised violence, including rape, abuse, torture, brutality, coercion, injury or mutilation and which suggests endorsement or approval of such behaviour or acts.

This definition has been conceived with the express intent not to implicate sexual explicitness *per se* or sexually explicit material that may possess *bona fide* artistic, literary, scientific or educational value. It recognises that there are sexually explicit depictions of women which are

341 I use the term "adult" to indicate that the material must be both directed at persons who are of the age of eighteen years or older and involve or depict persons who are eighteen years or older.

342 I use the term "heterosexual" to indicate that the material must be produced for the male heterosexual market and thus to be distinguished from gay, lesbian and child pornography.

343 I use the term "pornography" as a radical feminist construct to be distinguished from erotica which is characterised by the absence of subjugation, coercion and violence. See, in this regard, Andrea Dworkin and Catharine MacKinnon (eds) *Pornography and Civil Rights: A New Day for Women's Equality* (1988) at 38. See also par 5 4 3 1 and accompanying footnotes (*supra*).

344 Through the medium of pictures (including films, photographs, sketches or prints) or words.

345 Eighteen years of age or older. I make express reference to "women" in my definition of adult heterosexual pornography to ensure a gender-specific definition which is based on - and proceeds from - women's experience in and of pornography.

346 My definition of adult heterosexual pornography is not premised on nudity or sexual explicitness *per se*, but sexual explicitness within a specific context of gender objectification, subordination, degradation, dehumanisation and sexualised violence.

347 The term "subordination" is premised on "sexual submission, display and access": see MacKinnon "On Collaboration" in *Feminism Unmodified* 198 at 199 (*supra*).

348 "Objectification" is central to all adult heterosexual pornography. MacKinnon elaborates: "[w]omen, who are not given a choice, are objectified; or, rather 'the object is allowed to desire, if she desires to be an object ... [t]o be sexually objectified means having a social meaning imposed on your being that defines you as to be sexually used, according to your desired uses, and then using you that way.'" See "Sexuality" in *Toward a Feminist Theory of the State* (1989) 126 at 140, quoting Dworkin in *Pornography: Men Possessing Women* (1981) at 69. My emphasis. Objectification means that women are reduced to their body parts - "[w]e are pussy, beaver, bitch, chick, cunt - named after parts of our bodies or after animals interchangeably": see MacKinnon "On Collaboration" in *Feminism Unmodified* 198 at 199 (*supra*).

not pornographic as well as material that - although they subordinate women - is not sexually explicit and therefore does not constitute pornography.³⁴⁹ My definition of adult heterosexual pornography contains four elements and is thus restricted in scope. In order to be regarded pornography, material must be simultaneously directed at the male heterosexual market, be graphic and sexually explicit, be situated in a gender-specific context of objectification, subordination, dehumanisation or violence and must suggest endorsement or approval of such behaviour or acts. Harm is accordingly conceptualised in terms of sexual objectification, subordination and/or sexual violence.

The second proposed definition of pornography is set in a larger liberal feminist paradigm and is intended to sustain an argument against a particular category of adult heterosexual pornography on the basis that it constitutes hate speech within the meaning of section 16(2)(c) of the South African Constitution. It reads:

Adult³⁵⁰ heterosexual³⁵¹ pornography³⁵² is the graphic, sexually explicit representation³⁵³ of women which constitutes the advocacy of hatred that is based on gender and that constitutes incitement to cause harm.

The second proposed definition of pornography is not primarily intended to sustain an argument for the prohibition of this particular category of adult heterosexual pornography, but rather that some forms of pornography constitute the advocacy of gender hatred that, in turn, constitutes incitement to cause harm. Once successfully conceptualised as hate speech, this category of pornography will stand in direct conflict with the express prohibition articulated in section 16(2)(c) of the South African Constitution and section 29 of the Films and Publications Act.

³⁴⁹ Examples of depictions which subordinate women and yet are not sexually explicit would include advertisements for laundry detergents or household appliances which portray women as wash maids or domestics or a work environment in which women are portrayed as subordinate office assistants, receptionists or secretaries.

³⁵⁰ Directed at persons who are the age of eighteen years or older and which involves persons or depicts persons who are eighteen years or older.

³⁵¹ Produced for the male heterosexual market and thus to be distinguished from gay, lesbian and child pornography.

³⁵² To be distinguished from obscenity which centres on the stirring of prurient interest and is premised on moral condemnation.

³⁵³ Through the medium of pictures (including films, photographs, sketches or prints) or written texts.

5 6 CONCLUDING OBSERVATIONS

My discussion of the various legislative measures which preceded the Films and Publications Act of 1996 has revealed that they were indeed ill suited to address pornography as a constitutional issue in relation to women's fundamental rights and freedoms. It is my view, however, that the new system of regulation introduced by the Films and Publications Act likewise lacks the potential to address adult heterosexual pornography within a gender-specific context. Since the Act fails to situate pornography within the social construct of the power imbalance between the sexes and thus fails to acknowledge male dominance, female subordination and sexual inequality, two aspects of the Act could be seen as problematic.

The first pertains to the fact that the Films and Publications Act only prohibits the most extreme - and what most would in any event regard as the most objectionable - categories of pornography. To this end, the Act prohibits only child pornography, bestiality and material that is degrading, violent or that constitutes the advocacy of hatred which constitutes incitement to cause harm. All other forms of sexually explicit material - with the exception of *bona fide* scientific, documentary, artistic or literary publications or films which may not be restricted - are merely subject to classification. As a consequence, such material may be designated to adult premises or coupled with age restrictions and, where applicable, opaque covers. This means that the Films and Publications Act effectively turns a blind eye to legitimate feminist concerns about - as well as the issues that stand central to - pornography. One can only speculate about the rationale for consigning these types of pornography to adult premises. It would appear that the idea behind the regulation of the pornography industry stems from the desire to protect minors, the moral sensibilities of some adults and upmarket retail and residential property values. It is doubtful whether the protection and recognition of women's constitutional interests in equality, dignity and physical integrity should be seen as the rationale behind adult premises and age restrictions. I am also at a loss as to why the Films and Publications Act differentiates between "explicit violent sexual conduct"³⁵⁴ and "extreme violence",³⁵⁵ unless it serves to underscore that the latter is not necessarily sexually explicit and that extreme sexually explicit violence (against women) is not of sufficient concern to justify specific mention.

The second aspect of the Films and Publications Act which I regard as problematic stems from the use of the term "sexual conduct". Sexual conduct is defined in Schedule 11 of the Act as

"genitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, which includes anal intercourse; the fondling, or touching with any object, of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal

³⁵⁴ See Schedule 1(1)(b) of Act 65 of 1996 (*supra*).

³⁵⁵ See Schedule 1(1)(e) of Act 65 of 1996 (*supra*).

contact.”

As was the case with the Publications Act of 1974, these criteria appear to be a mixture of various criteria used in different legal systems. The reference to “the lewd display of genitals” is reminiscent of United States obscenity law and is suggestive of prurience or sexual arousal as precondition to constitutional intervention. This suggestion is also encountered in Schedule 1(1)(a) and Schedule 6(1)(a) where the same phrase appears in relation to child pornography. It is my view that the Films and Publications Act does not respond adequately to the specific constitutional challenges presented by adult heterosexual pornography. The gender-specific subordination and objectification that stand central to all adult heterosexual pornography is completely overlooked in the hesitancy to pander to the rights and interests of the individual. Had the drafters of the Films and Publications Act considered the role that pornography plays in the construction of powerful subject positions through which women live their lives, they may well have articulated an altogether different response to so-called category X18 material in the light of South Africa’s reality of sexism and gender-specific sexual violence.

The need to do so will hopefully become apparent in the next chapter where the two definitions of adult heterosexual pornography which I have proposed will be considered with reference to specific rights and freedoms³⁵⁶ that are entrenched under the Bill of Rights in the South African Constitution.

³⁵⁶

Notably the right to equality, the right to human dignity and the right to freedom and security of the person that are respectively entrenched in sections 9, 10 and 12 of Act 108 of 1996 (*supra*).

CHAPTER 6

REASONABLE AND JUSTIFIABLE LIMITATIONS ON ADULT HETEROSEXUAL PORNOGRAPHY WITHIN THE AMBIT OF THE BILL OF RIGHTS IN THE SOUTH AFRICAN CONSTITUTION

| | PAGE |
|--|------|
| 6 1 INTRODUCTION | 255 |
| 6 2 THE PRIMARY AND ALTERNATIVE CONSTITUTIONAL ARGUMENTS AGAINST PORNOGRAPHY: A PATRIARCHAL PRACTICE OR A HATEFUL AND DEGRADING MODE OF EXPRESSION? | 257 |
| 6 3 THE PRIMARY CONSTITUTIONAL ARGUMENT: ADULT HETEROSEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE | 257 |
| 6 4 ADULT HETEROSEXUAL PORNOGRAPHY AS PATRI- ARCHAL PRACTICE AND THE RIGHT TO EQUALITY AS FUNDAMENTAL CONSTITUTIONAL VALUE AND IDEAL | 258 |
| 6 4 1 The South African Constitutional Court's Conception of Equality | 258 |
| 6 4 2 The South African Constitutional Court's Analysis of the Right to Equality | 262 |
| 6 4 2 1 The Three States of Enquiry | 264 |
| 6 4 2 2 The Relationship between Differentiation and the (General) Limitation Clause of the South African Constitution | 267 |
| 6 4 2 3 "Mere Differentiation" and the Relationship between Sections 9(1) and 9(3) of the South African Constitution | 269 |
| 6 4 2 4 Discrimination Defined: "Fair" and "Unfair" Discrimination and the centrality of Human Dignity | 270 |
| 6 4 2 5 The Expressly Enumerated and Analogous Grounds of Differentiation and the Matter of Direct and Indirect Discrimination | 275 |
| 6 4 3 Adult Heterosexual Pornography and the Rights to Equality and Human Dignity: Unfair Discrimination on the Basis of Sex? | 280 |
| 6 4 3 1 The First Stage of the Enquiry: An Assessment in terms of Section 9(1) of the South African Constitution | 280 |
| 6 4 3 2 Does Adult Heterosexual Pornography Differentiate between People or Categories of People? | 281 |
| 6 4 3 1 2 Does the Differentiation Bear a Rational Connection to a Legitimate (State) Purpose? | 283 |

| | | |
|-----------|--|-----|
| 6 4 3 2 | The Second Stage of the Enquiry: An Assessment of Adult Heterosexual Pornography in terms of Section 9(3) of the South African Constitution | 284 |
| 6 4 3 2 1 | Does the Differentiation Amount to "Discrimination"? | 285 |
| 6 4 3 2 2 | If the Differentiation Amounts to "Discrimination", Does It Constitute "Unfair Discrimination"? | 286 |
| 6 4 3 3 | The Final Stage of the Enquiry: Can Adult Heterosexual Pornography as Patriarchal Practice be Justified under Section 36 of the South African Constitution? | 293 |
| 6 4 4 | To Summarise | 295 |
| 6 5 | ADULT HETEROSEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE AND THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON | 296 |
| 6 5 1 | The Right to Freedom of the Person: Freedom from Violence, Torture and Cruel, Inhuman and Degrading Treatment | 297 |
| 6 5 2 | The Right to Security of the Person: Security in and Control over One's Body | 301 |
| 6 5 3 | Adult Heterosexual Pornography: The Gender-specific Violence and Abuse Revealed | 302 |
| 6 5 4 | Adult Heterosexual Pornography and its Role in a Culture of Gender-specific Sexual Violence and Abuse | 306 |
| 6 6 | THE ALTERNATIVE CONSTITUTIONAL ARGUMENT: ADULT HETEROSEXUAL PORNOGRAPHY AS THE ADVOCACY OF HATRED BASED ON GENDER THAT CONSTITUTES INCITEMENT TO CAUSE HARM | 311 |
| 6 6 1 | The Philosophical Justification of Freedom of Expression as Foundational Constitutional Right | 312 |
| 6 6 2 | Expression Specifically Excluded: The Structure, Contents and Requirements of Section 16(2) of the South African Constitution | 314 |
| 6 6 3 | Conceptualising the Advocacy of Hatred | 315 |
| 6 6 4 | Adult Heterosexual Pornography as the Advocacy of Hatred that Constitutes Incitement to Cause Harm | 317 |
| 6 6 5 | The Relationship between Section 16(2) and Section 36 of the South African Constitution | 319 |
| 6 7 | CONCLUDING OBSERVATIONS | 121 |

CHAPTER 6

REASONABLE AND JUSTIFIABLE LIMITATIONS ON ADULT
HETEROSEXUAL PORNOGRAPHY WITHIN THE AMBIT OF THE BILL
OF RIGHTS IN THE SOUTH AFRICAN CONSTITUTION

"Pornography turns sex inequality into sexuality and turns male dominance into the sex difference. Put another way, pornography makes inequality into sex, which makes it enjoyable, and into gender, which makes it seem natural."¹

"I am asking you to imagine that women's reality is real - something of a leap of faith in a society saturated with pornography, not to mention an academy saturated with deconstruction. In the early 1980s women spoke of this reality, in Virginia Woolf's words of many years before, 'against the male flood': they spoke of being sexually abused. Thirty-eight percent of women are sexually molested as girls; twenty-four percent of us are raped in our marriages. Nearly half are victims of rape or attempted rape at least once in our lives ... mostly [by] men we know. Eighty-five percent of women who work outside the home are sexually harassed at some point by employers. We do not yet know how many women are sexually harassed by their doctors or how many women are bought and sold as sex - the one thing men will seemingly always pay for, even in a depressed economy."²

"All women live in sexual objectification the way fish live in water. Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse."³

6.1 INTRODUCTION

Now that I have critically assessed the various approaches adopted by United States, Canadian and South African courts in respect of sexually explicit material and have formulated suitable conceptions of pornography and harm in the preceding chapter, I shall proceed to consider adult heterosexual pornography in relation to specific rights and freedoms entrenched in the Bill of Rights in the South African Constitution.⁴ To this end, the two definitions of adult heterosexual pornography which I have formulated (and which are intended to provide the platform for the primary and alternative constitutional arguments that I intend to employ against pornography)⁵

¹ Catharine MacKinnon "Introduction" in *Feminism Unmodified: Discourses on Life and Law* (1987) 1 at 3 (hereinafter referred to as *Feminism Unmodified*).

² MacKinnon "Defamation and Discrimination" in *Only Words* (1993) 3 at 7 - 8.

³ MacKinnon "Sexuality" in *Toward a Feminist Theory of the State* (1989) 126 at 149 (hereinafter referred to as *Feminist Theory*).

⁴ Act 108 of 1996.

⁵ See Chapter 5 of this dissertation par 5.5, especially par 5.5.1 - par 5.5.2 and accompanying footnotes (*supra*).

will be assessed with particular reference to the rights to equality,⁶ human dignity⁷ and freedom and security of the person⁸ as well as the constitutional prohibition of incitement to (gender) hatred.⁹

I shall first consider the significance of the right to equality in historical context,¹⁰ assess how this right has been interpreted by the South African Constitutional Court¹¹ and then proceed to evaluate pornography in light of this juridical framework.¹² By virtue of the fact that the idea of equality is premised on the understanding that every person possesses inherent equal dignity and that this notion is so fundamental to the determination of unfairness¹³ within the context of the equality clause, the impact of adult heterosexual pornography on the right to human dignity will be assessed within this specific (constitutional) context. The constitutional implications of pornography in respect of the right to freedom and security of the person, particularly in relation to freedom from violence,¹⁴ torture,¹⁵ cruel, inhuman and degrading treatment¹⁶ and security in and control over one's body¹⁷ will thereafter be examined.¹⁸ The chapter will conclude with an assessment of whether a specific category of pornography constitutes incitement to gender hatred within the ambit of the specific internal limitation to freedom of expression¹⁹ contained in the

⁶ See section 9 of Act 108 of 1996 (*supra*).

⁷ See section 10 of Act 108 of 1996 (*supra*).

⁸ See section 12 of Act 108 of 1996 (*supra*).

⁹ See section 16(2)(c) of Act 108 of 1996 (*supra*).

¹⁰ See par 6 4 1 and accompanying footnotes (*infra*).

¹¹ See par 6 4 2, especially par 6 4 2 1 - par 6 4 2 5 and accompanying footnotes (*infra*).

¹² See par 6 4 3, especially par 6 4 3 1 - par 6 4 3 3 and accompanying footnotes (*infra*).

¹³ See par 6 4 2 4 and accompanying footnotes (*infra*).

¹⁴ See section 12(1)(c) of Act 108 of 1996 (*supra*).

¹⁵ See section 12(1)(d) of Act 108 of 1996 (*supra*).

¹⁶ See section 12(1)(e) of Act 108 of 1996 (*supra*).

¹⁷ See section 12(2)(b) of Act 108 of 1996 (*supra*).

¹⁸ See par 6 5 and accompanying footnotes (*infra*).

¹⁹ See section 16(2)(c) of Act 108 of 1996 (*supra*).

Bill of Rights in the South African Constitution.²⁰

6 2 THE PRIMARY AND ALTERNATIVE CONSTITUTIONAL ARGUMENTS AGAINST PORNOGRAPHY: A PATRIARCHAL PRACTICE OR A HATEFUL AND DEGRADING MODE OF EXPRESSION?

I explained in Chapter 2 of this dissertation that my assessment of the constitutionality of adult heterosexual pornography is guided by - and thus proceeds from - two distinct feminist perspectives of women's oppression.²¹ And because these two feminist paradigms give rise to two contrasting conceptions of pornography, I argued that these two theoretical frameworks could be employed with great effect in the present study to assist with the formulation of a primary and alternative constitutional argument against adult heterosexual pornography.²² As a consequence, I have formulated a primary constitutional argument against pornography which rests on the radical feminist contention that pornography is a patriarchal practice or system of subordination which constitutes a violation of the constitutional guarantee of equality²³ and an alternative constitutional argument which conceptualises pornography as a mode of expression which has the potential to target particular categories of sexually explicit material that could be said to constitute a violent or degrading form of expression, popularly referred to as hate speech.²⁴ I shall now proceed to consider the first constitutional argument against adult heterosexual pornography which conceptualises it as a patriarchal practice of sexual subordination.

6 3 THE PRIMARY CONSTITUTIONAL ARGUMENT: ADULT HETEROSEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE

I showed in Chapter 2 of this dissertation how Catharine MacKinnon - guided by Andrea Dworkin's understanding of the interrelationship between (female) sexuality and male power -

²⁰ See par 6 6 and accompanying footnotes (*infra*).

²¹ See Chapter 2 of this dissertation par 2 1 and accompanying footnotes (*supra*).

²² See Chapter 2 of this dissertation par 2 3 3 and par 2 4 3 and accompanying footnotes (*supra*).

²³ See Chapter 2 par 2 4 3 and accompanying footnotes (*supra*).

²⁴ See Chapter 2 par 2 3 3 and accompanying footnotes (*supra*).

conceptualises pornography as a practice of discrimination on the basis of sex.²⁵ Dworkin and MacKinnon accordingly conceive of pornography as a manifestation of male power which serves to subordinate women and both scholars thereby restrict their constitutional discourse on pornography to an equality analysis. To my mind, it is possible to conduct a more nuanced analysis of adult heterosexual pornography within the ambit of the Bill of Rights in the South African Constitution. By conceptualising pornography as a patriarchal structure it becomes possible to explore the constitutional ramifications of pornography in relation to women's constitutional interests in - apart from equality - human dignity as well as freedom and security of the person. Although the common purpose of these arguments could be seen as actively promoting the achievement of (substantive) equality for women, they are decidedly distinct - both theoretically and analytically. I shall now give an exposition of how the South African Constitutional Court interprets the right to equality whereafter I shall examine whether adult heterosexual pornography constitutes a violation of section 9 of the South African Constitution within the context of this juridical framework.²⁶

6 4 ADULT HETEROSEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE AND THE RIGHT TO EQUALITY AS FUNDAMENTAL CONSTITUTIONAL VALUE AND IDEAL

6 4 1 The South African Constitutional Court's Conception of Equality

In light of South Africa's history of institutionalised discrimination, oppression and subjugation, it is hardly surprising that the South African Constitution contains numerous references to equality. As a direct consequence of this history of prejudice, exclusion and discrimination, the South African Constitution - like its 1993 predecessor²⁷ - contains various commitments to reject past hatred and prejudices as a basis of public conduct and decision making. To this end, equality is viewed as a core value which underlies the democratic society envisioned by both the

²⁵ See Chapter 2 of this dissertation par 2 4 2, especially par 2 4 2 3 and accompanying footnotes (*supra*). For a comprehensive and detailed account of the *formal* understanding of discrimination based on sex, see Katherine Bartlett "Formal Equality in Federal Anti-Discrimination Legislation: Title VII - Finding the Limits of Formal Equality" in *Gender and Law: Theory, Doctrine, Commentary* (1993) 135 - 175 (hereinafter referred to as *Gender and Law*).

²⁶ See par 6 4 3 and accompanying footnotes (*infra*).

²⁷ The Constitution of the Republic of South Africa, Act 200 of 1993 (*supra*), popularly referred to as the Interim Constitution.

Interim and Final Constitutions.²⁸ The preamble to the South African Constitution states that the Constitution is adopted as the supreme law of the Republic in order to “[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.” The Founding Provisions in Chapter 1 of the South African Constitution furthermore declare that the Republic is one, sovereign democratic state founded on the values of “the achievement of equality”²⁹ and “non-racialism and non-sexism”.³⁰ The Bill of Rights affirms itself as “the cornerstone of democracy in South Africa” and “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”³¹ And apart from the specific and elaborate equality clause contained in the Bill of Rights,³² the South African Constitution also urges courts and other tribunals to “promote the values that underlie an open and democratic society based on human dignity, freedom and equality.”³³ In recognition, the Constitutional Court interprets the notion of equality as both a fundamental ideal and value of the post-apartheid South African legal and constitutional order.³⁴ The court has - ever since its inception - often highlighted the consequences of systemic racial discrimination under apartheid and pointed out in *Brink v Kitshoff NO*³⁵ that black people were, *inter alia*, prevented from owning immovable property (or residing in areas classified as white),

²⁸ This was recognised in respect of Act 200 of 1993 (*supra*) in *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC) at 161 - 162.

²⁹ See section 1(a) of Act 108 of 1996 (*supra*).

³⁰ See section 1(b) of Act 108 of 1996 (*supra*).

³¹ See section 7(1) of Act 108 of 1996 (*supra*). These three core values also find recognition and expression in sections 1(a), 9, 10, 36(1) and 39(1)(a) of Act 108 of 1996 (*supra*).

³² For the full text of the equality clause, see par 6 4 2 and accompanying footnotes (*infra*).

³³ See sections 36(1) and 39(1)(a) of Act 108 of 1996 (*supra*). The Interim Constitution was similarly encased in the language of equality. The first paragraph of the Preamble spoke of the “need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to exercise their fundamental rights and freedoms.” Equality was also inscribed in the Constitutional Principles I, II and V of Schedule 4 of Act 200 of 1993 (*supra*). Section 232(4) stated that the Schedules, together with the Preface and Afterword “shall for all purposes be deemed to form part of the substance of the Constitution.”

³⁴ For more on historical interpretation as hermeneutical guideline for constitutional interpretation, see Chapter 1 of this dissertation par 1 3, especially par 1 3 1 4 and accompanying footnotes (*supra*).

³⁵ 1996 (6) BCLR 752 (CC).

holding senior positions or having access to civic amenities, established schools and universities.³⁶ The Constitutional Court has therefore duly acknowledged that there cannot be a new legal and political order if the crucial issue of equality is not addressed adequately and comprehensively.

The legacy of racial and gender inequality inherited from the past means that the commitment to equality in both the Interim and Final Constitutions cannot simply be understood as a commitment to formal equality which - as I pointed out in Chapter 2 of this dissertation³⁷ - assumes that all persons are equal bearers of rights. In light of South Africa's particular legal and political history, the simple removal of racist or sexist laws from the statute books in accordance with the principle of formal equality will therefore fall short of the democratic society envisioned by both of these Constitutions.³⁸ Viewed within the context of the tenets and objects of the new South African legal and constitutional order and the historical burden of inequality that it seeks to overcome, a purely formal understanding of equality will therefore run the risk of neglecting the very objectives that the South African Constitution seeks to realize. In contrast to a formal understanding of equality, substantive equality is supportive of these fundamental constitutional values in that it requires an examination of the actual social and economic conditions of groups and individuals. Substantive equality, therefore, mandates the eradication of all social, economic and political barriers to the achievement of an equitable legal society. Mindful of these particular challenges as well as the constitutional values of human dignity, equality and freedom, the Constitutional Court has embraced an approach to equality in which the actual impact of an alleged violation of the right to equality on persons or categories of persons within (and outside of) different social groups is to be examined in relation to the prevailing social, economic and political circumstances in our country.³⁹ This is borne out by the fact that the Constitutional Court has on occasion duly recognised the need to "develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot insist upon identical treatment in all

³⁶ At 768 (*supra*).

³⁷ See Chapter 2 of this dissertation par 2 3 2, especially par 2 3 2 4 and accompanying footnotes (*supra*).

³⁸ The need to embrace a substantive notion of equality is further underscored by the equality clause of Act 108 of 1996 (*supra*) which, *inter alia*, permits measures "designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination" and a list of socio-economic rights contained in the Bill of Rights which require the state to implement progressive measures to achieve a minimum level of basic goods such as education for all (section 29(1)), the right not to be refused emergency medical treatment (section 27(3)) and the right of a child to basic nutrition, shelter, basic health care services and social services (section 28(1)(b)).

³⁹ See *Brink v Kitshoff NO* at 768 (*supra*).

circumstances.”⁴⁰ Each case will therefore “require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not,” because “a classification which is unfair in one context may not necessary be unfair in a different context.”⁴¹ The South African Constitutional Court thus clearly embraces the notion of substantive equality.⁴² This is to be welcomed because since substantive equality requires a court to examine the actual socio-political conditions of groups and individuals, it can reveal systemic and pervasive structures or practices of inequality which require due consideration in the formulation of jurisprudential approaches to equality rights in a gender-specific context.⁴³

The express commitment to affirmative action in the equality clause of the South African Constitution⁴⁴ has led the Constitutional Court to extend its substantive conception of equality to also include what it refers to as “remedial or restitutionary” equality.⁴⁵ According to the court, remedial or restitutionary equality recognises that past unfair discrimination “frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.”⁴⁶ The Constitutional Court has suggested that a remedial approach to equality would require it to consider the impact of the constitutionally relevant differentiation on

⁴⁰ *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) at 729.

⁴¹ At 729 (*supra*).

⁴² See also Catherine Albertyn and Beth Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 14 *SAJHR* 248 and Claire L’Heureux-Dube “Making a Difference: The Pursuit of Equality and a Compassionate Justice” 1997 13 *SAJHR* 335.

⁴³ See Albertyn and Janet Kentridge “Introducing the Right to Equality in the Interim Constitution” 1994 10 *SAJHR* 149 at 152 - 153.

⁴⁴ See section 9(2) of Act 108 of 1996 (*supra*) which makes provision for “legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination.” For a discussion of the Constitutional Court’s interpretation of section 9 of Act 108 of 1996 (*supra*), see par 6 4 2 and accompanying footnotes (*infra*).

⁴⁵ See *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC).

⁴⁶ At 1546 (*supra*).

the complainant by taking into account the context⁴⁷ in which the complainant finds him or herself. This further underscores the argument that it would be insufficient to merely ensure that statutory provisions which have caused unfair discrimination in the past are eliminated, for the negative consequences of past unfair discrimination - such as a social climate of endemic gender-specific violence - must also be addressed.

To summarise: the South African Constitutional Court employs a substantive conception of equality through which it seeks to address the very real consequences of racist and sexist structures or practices that flourished under the ideology of apartheid. The Constitutional Court therefore recognises that in order to give real meaning to the constitutional commitment to equality, the actual social, legal and political conditions of individuals or groups in South African society need to be examined with a view to also address the (perpetuating) negative consequences of past (unfair) discrimination.

I shall now proceed to examine the Constitutional Court's analysis of the right to equality as entrenched under the Bill of Rights in the South African Constitution in more detail.

6 4 2 The South African Constitutional Court's Analysis of the Right to Equality

The right to equality is entrenched in section 9 of the South African Constitution. Section 9 contains five subsections which respectively embrace the principle of equality before the law (and confers the right to equal protection and benefit of the law), provide for affirmative action, contain a prohibition of unfair discrimination on certain grounds, extend the prohibition of unfair discrimination to horizontal relationships⁴⁸ and presume state or private discrimination on the

⁴⁷ In *Brink v Kitshoff NO* at 768 (*supra*) the Constitutional Court has indicated that this context is formed, first, by the constitutional text in its entirety and secondly, by the country's recent history, particularly the systematic discrimination suffered by black people under apartheid as well as systematic patterns of discrimination on grounds other than race that have caused - and may continue to cause - considerable harm. Any consideration of whether a legally relevant differentiation actually constitutes a breach of the equality clause will therefore first have to take into account the history of the impugned provision as well as the history of the relevant group or groups to which the complainant belongs.

⁴⁸ Traditionally, a bill of fundamental rights regulates the relationship between the individual and the state. This constitutes the so-called "vertical relationship". The Bill of Rights of Act 108 of 1996 (*supra*) performs the traditional task of protecting individuals against state action by compelling the legislature, executive and judiciary to comply with its provisions. But in addition, the Bill of Rights of the South African Constitution also recognises that private abuse of human rights may be as pernicious as violations perpetrated by the state. For this reason, the Bill of Rights is not confined to the protection of individuals against the state and in certain circumstances

enumerated grounds to be unfair. Section 9 reads:

"Equality

- 9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.⁴⁹
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds,⁵⁰ including race, gender, sex, pregnancy,⁵¹ marital status,⁵² ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁵³
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Ever since the adoption of the Interim Constitution in 1994,⁵⁴ the South African Constitutional Court has on numerous occasions been called upon to interpret the right to equality. It is not,

protects individuals against abuses of their rights by other individuals. This constitutes the so-called "horizontal" application of the Bill of Rights: see, in general, Lorraine Wolhuter "Horizontality in the Interim and Final Constitutions" 1996 11(2) *SAPL/PR* 512.

⁴⁹ Section 9(1) of Act 108 of 1996 (*supra*) is a repetition of the liberal ideology contained in the Fourteenth Amendment to the Constitution of the United States of America which provides that no state shall deny to any person within its jurisdiction the equal protection of the law: see, in general, Alan Freeman "Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of the Supreme Court Doctrine" 1978 62 *Minnesota Law Review* 1049.

⁵⁰ The grounds listed in section 9(3) of Act 108 of 1996 (*supra*) do not constitute a *numerus clausus*. This is indicated by the use of the word "including". Since the subsection contains specific examples of "one or more" grounds on which discrimination is expressly prohibited, it follows that direct or indirect discrimination is also prohibited on grounds analogous to the seventeen expressly enumerated grounds.

⁵¹ Pregnancy was not included as ground for discrimination in Act 200 of 1993 (*supra*).

⁵² Marital status was not included as ground for discrimination in Act 200 of 1993 (*supra*).

⁵³ Birth was not included as ground for discrimination in Act 200 of 1993 (*supra*).

⁵⁴ Act 200 of 1993 (*supra*) entered into force on April 27, 1994.

therefore, surprising that most of the Constitutional Court's equality jurisprudence to date attends to section 8 of the Interim Constitution, the predecessor of section 9 of the Final Constitution. However, the two clauses are similar enough that "notwithstanding certain differences in the wording of these provisions",⁵⁵ the Constitutional Court's interpretation of section 8 of the Interim Constitution can also be applied to section 9 of the Final Constitution.⁵⁶ A number of principles have since crystalized in respect of the court's interpretation of the right to equality. These principles relate to the different stages of enquiry to determine a violation of the equality clause, the relationship between the right to equality and the general limitation clause, the relationship between "mere" differentiation and "unfair" discrimination and the expressly enumerated and analogous grounds of differentiation. A closer inspection of each of these principles will now follow.

6 4 2 1 The Three Stages of Enquiry

While section 9 of the South African Constitution acknowledges the notion of equal protection of the law, it separates the fundamental proposition of equality as outlined in section 9(1) from the specific anti-discrimination clause which lists the prohibited categories of differentiation. The various interpretive steps to be followed where a violation of the right of equality under section 8 of the Interim Constitution is alleged, was set out by the Constitutional Court in *Harksen v Lane NO*.⁵⁷ The court summed up the three stages of enquiry as follows:

- "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government

⁵⁵ See *National Coalition for Gay & Lesbian Equality v Minister of Justice* par 15 (*supra*).

⁵⁶ Both section 8 of Act 200 of 1993 (*supra*) and section 9 of Act 108 of 1996 (*supra*) grant, in separate clauses, a right to equal protection and benefit of the law and a right to non-discrimination. Both formulations also expressly provide that affirmative action measures are constitutionally valid. Although the negative formulation of section 8(3)(a) (to the effect that equality is not prejudiced by affirmative action) is replaced by a positive formulation in section 9(2) (which states that equality includes remedial measures), this substitution appears to be of little more than symbolic significance. The restitution of land rights in section 8(3)(b) has been removed to section 25(7) of Act 108 of 1996 (*supra*) where it is part of the property clause (and more logically belongs). There are, however, two differences between the two formulations that are worth noting. First, the listed grounds of unfair discrimination in section 9(3) are more extensive than those in section 8(2) and secondly, section 9(4) is horizontally applicable to non-discrimination. Under Act 200 of 1993 (*supra*), the non-discrimination right applied directly against the state only. In respect of the enumerated grounds of discrimination and the horizontal application of the equality clause, see also n 48 and n 50 (*supra*).

⁵⁷ 1997 (11) BCLR 1489 (CC).

- purpose? If it does not then there is a violation of [section 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
- (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section [9(3) and (4)].

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."⁵⁸

The Constitutional Court quite obviously employs a threshold test in respect of the equality clause. This means that a preliminary enquiry must first be launched to determine whether the impugned law or conduct differentiates between people or categories of people. It follows that if there is no differentiation, there can also be no question of a violation of any part of the equality clause. If a provision or conduct does, however, differentiate between individuals or groups, a two-stage analysis must follow.

The first stage of the analysis concerns the right to equal treatment and equality before the law and tests whether the law or conduct in dispute has a rational basis. A court must therefore determine whether there is a rational connection between the differentiation in question and a legitimate government purpose that it is designed to further or achieve. In the absence of a rational connection, the impugned law or conduct will violate section 9(1) and consequently fails the first stage of the investigation. Section 9(1) thus makes it clear that "both in conferring benefits on persons and by imposing restraints on state and other action, the state ha[s] to do so in a way which results in the equal treatment of all persons."⁵⁹ If, however, the differentiation is shown to be rationally connected to a legitimate government purpose, the second stage of enquiry is activated. A differentiation that is rational may none the less constitute unfair

⁵⁸ At 1511 - 1512 (*supra*).

⁵⁹ See *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at 272.

discrimination under subsections (3) or (4) of the equality clause.⁶⁰ In principle, both unfair discrimination and differentiation without a rational basis can be justified as limitations of the right to equality in terms of section 36 (the general limitation clause), albeit - as I shall point out below⁶¹ - with considerable conceptual difficulty, particularly in light of the constitutional values of human dignity, equality and freedom.

Although the structure of the enquiry in terms of section 9 of the South African Constitution appears to be quite systematic, the Constitutional Court has cautioned that since the right to equality is a "composite right",⁶² it is neither desirable nor feasible to divide the equal treatment and non-discrimination components of the equality clause into watertight compartments. Moreover, the court has also held that a court needs not "inevitably" perform both stages of the enquiry because the first-stage rational basis inquiry would be "clearly unnecessary" in an instance in which a court holds that the discrimination is unfair and unjustifiable.⁶³ In other words, in those instances in which a court finds that a provision or conduct unjustifiably infringes section 9(3) or 9(4), there is no need to first consider whether the law or conduct is a violation of section 9(1) of the equality clause.⁶⁴

I shall now turn to consider the link between unfair differentiation and the general limitation clause of the South African Constitution in closer detail.

⁶⁰ See par 6 4 2 3 and accompanying footnotes (*infra*).

⁶¹ See par 6 4 2 2 and accompanying footnotes (*infra*). See also par 6 4 3 3 and accompanying footnotes (*infra*).

⁶² This description emanates from *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) at 770.

⁶³ See *National Coalition for Gay & Lesbian Equality v Minister of Justice* par 18 (*supra*).

⁶⁴ This was the approach followed by Judge Dennis Davis in the Cape High Court in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (3) SA 173 (C). Davis held that provisions of immigration legislation which grant favourable status to spouses of South African citizens constituted unfair discrimination on grounds of sexual orientation, without first considering whether the measure was a violation of the right to equal treatment under section 9(1) of Act 108 of 1996 (*supra*).

6 4 2 2 The Relationship between Differentiation and the (General) Limitation Clause of the South African Constitution

Section 36 of the South African Constitution contains a general limitation clause⁶⁵ which requires a two-stage process of analysis. It is referred to as a two-stage analysis because a distinction is made between the first stage during which an infringement of a right is established and the second stage during which it must be established whether the infringement of the right in question was justified in terms of the limitation clause.⁶⁶ During the second stage of the analysis the court is called upon to weigh competing values and must ultimately make an assessment based on proportionality which calls for a balancing of competing interests.⁶⁷ Section 36 reads:

“Limitation of rights

- 36 (1) The Rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”⁶⁸

Seen within the context of the right to equality, it is - to my mind - far from clear whether section

⁶⁵ It is general because it applies in the same way to all the rights in the Bill of Rights of Act 108 of 1996 (*supra*): see, in general, “Limitation” in J de Waal et al *The Bill of Rights Handbook* (2000) 132 at 133 n 4 (hereinafter referred to as *Handbook*).

⁶⁶ See, in general, Stuart Woolman “Limitations” in M Chaskalson et al *Constitutional Law of South Africa* (1998) par 12.1(c)(iii) (hereinafter referred to as *Constitutional Law*) and Johan de Waal et al “Limitation” in *Handbook* 132 at 133 - 135 (*supra*).

⁶⁷ See *S v Makwanyane* 1995 (6) BCLR 665 (CC) at 707 - 708.

⁶⁸ This formulation honours Chaskalson J’s exposition of the relevant circumstances to be taken into account in an assessment of proportionality in *S v Makwanyane* at 708 (*supra*). He elaborated that the relevant considerations will include “the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In this process regard must be had to the provision of section 33(1) [now section 36], and the underlying values of the [Interim] Constitution.”

36 has any meaningful application to the equality clause. As Farlam J on occasion rightly pointed out,⁶⁹ it is difficult to see how any discrimination that has already been characterised as “unfair” because it is “based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings”⁷⁰ can ever be justifiable in an open and democratic society based on human dignity, equality and freedom. Similarly, it is difficult to see how one can justify as “reasonable” a law which differentiates for reasons not rationally related to a legitimate government purpose and which is therefore arbitrary. Yet despite these conceptual difficulties, the Constitutional Court has on every occasion when it has found a violation of section 9 also considered the effect of the limitation clause, even though a limitation of the right to equality has never been upheld under the limitation clause.⁷¹ In his dissenting judgment in *President of the Republic of South Africa v Hugo*, Kriegler J suggested that the factors that would (or could) justify interference with the right to equality under the limitation clause should be distinguished from those relevant to the enquiry to determine whether there has been unfair discrimination under the equality clause. The former are concerned with justification, possibly notwithstanding unfairness; the latter are concerned “with fairness and nothing else.”⁷² In *Harksen v Lane NO*, the Constitutional Court stated that the limitation analysis involves “a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.”⁷³ This does not, however, shed much light on the matter since the factors taken into account to determine whether the discrimination is unfair (in other words, to determine the impact of the discriminatory measure) are very similar to the factors which are used to assess the proportionality of a limitation in terms of section 36 of the South African Constitution. In fact, when called upon to assess whether a limitation is proportional to the purpose it seeks to achieve, the Constitutional Court has held that the reasons for the restriction must be acceptable in an open and democratic society based on the values of human dignity, equality and freedom and that

⁶⁹ In *S v K* 1997 (9) BCLR 1283 (C) at 1291.

⁷⁰ Per Goldstone J in *Harksen v Lane NO* at 1511 (*supra*).

⁷¹ See *Brink v Kitshoff NO* (*supra*); *S v Ntuli* 1996 (1) BCLR 141 (CC) and *Fraser v Children's Court, Pretoria North* (*supra*). In a dissenting opinion in *President of the Republic of South Africa v Hugo* (*supra*), Mokgoro J held that even though a Presidential Act ordering the release of mothers of young children from prison was unfair discrimination, it was nevertheless justifiable under the limitation clause. See also par 6 4 2 4 and accompanying footnotes (*infra*).

⁷² At 7741 - 742 (*supra*). Kriegler J then criticised the majority of the Constitutional Court for invoking factors such as public reactions to the release of prisoners and administrative efficiency when considering the fairness of the discrimination. See also par 6 4 2 4 and accompanying footnotes (*supra*).

⁷³ At 1511 (*supra*).

the restriction must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose.⁷⁴

I shall now turn to assess the notion of “mere” differentiation and the relationship between sections 9(1) and 9(3) of the equality clause.

6 4 2 3 “Mere Differentiation” and the Relationship between Sections 9(1) and 9(3) of the South African Constitution

The equality clause of the South African Constitution can be seen as an acknowledgement that differentiation is a necessary feature of any legal and political dispensation and that not every differentiation could therefore be construed to constitute unequal treatment.⁷⁵ As a consequence, it is the task of the equality provision to aid the identification of the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. These criteria are found in section 9(3). As indicated above,⁷⁶ section 9(3) contains expressly enumerated grounds that would constitute unfair discrimination.⁷⁷ It follows therefore that in terms of section 9(3), differentiation is legally permissible on condition that such differentiation does not amount to unfair discrimination. I also pointed out above⁷⁸ that the South African Constitutional Court employs the term “mere differentiation” to refer to differentiation which does not constitute unfair discrimination. Mere differentiation will therefore be constitutionally valid on condition that it does not deny persons or categories of persons equal protection or benefit of the law or does not amount to unequal treatment under the law in violation of section 9(1).⁷⁹ And I have indicated⁸⁰ that according to the Constitutional Court, a law or conduct will violate section 9(1)

⁷⁴ See *S v Makwanyane* at 708 (*supra*) and *S v Bhulwana* 1996 (1) SA 338 (CC) par 18. See also par 6 6 5 and accompanying footnotes (*infra*).

⁷⁵ In *Prinsloo v Van der Linde* (*supra*), the Constitutional Court duly acknowledged that it would be impossible to govern a modern country like South Africa efficiently and to harmonise the interest of all its people for the common good without differentiation and classifications which treat people differently and impact on them differently.

⁷⁶ See par 6 4 2 and accompanying footnotes (*supra*).

⁷⁷ The grounds expressly enumerated in section 9(3) of Act 108 of 1996 (*supra*) also include those grounds that are analogous to the ones expressly listed. See also par 6 4 2 5 and accompanying footnotes (*infra*).

⁷⁸ See par 6 4 2 1 and accompanying footnotes (*supra*).

⁷⁹ See *Prinsloo v Van der Linde* at 771 (*supra*), quoting Didcott J in *S v Ntuli* at 150 (*supra*). See also *City Council of Pretoria v Walker* at 272 (*supra*).

⁸⁰ See par 6 4 2 1 and accompanying footnotes (*supra*).

if the differentiation does not have a legitimate purpose and if there is “no rational relationship between the differentiation in question and the purpose which is proffered to validate it.”⁸¹ The rational connection test applied in the case of section 9(1) thus appears to be far less exacting than the test to determine whether the limitation of a right is justifiable under the limitation clause,⁸² particularly since the purpose of the rational connection is simply to enquire “whether the differentiation is arbitrary or irrational or manifests naked preferences.”⁸³

6 4 2 4 Discrimination Defined: “Fair” and “Unfair” Discrimination and the Centrality of Human Dignity

Unlike “mere differentiation” which I discussed above,⁸⁴ discrimination amounts to differentiation on illegitimate grounds.⁸⁵ The Constitutional Court has held that differentiation on the grounds that are expressly enumerated in⁸⁶ as well as on grounds that are analogous to⁸⁷ section 9(3) of the South African Constitution will constitute discrimination. But since the equality clause does not prohibit discrimination *per se* but rather unfair discrimination, it follows that not all discrimination can be deemed unfair. In the words of the Constitutional Court, unfair discrimination “principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”⁸⁸ Since differentiation on one or more of the enumerated grounds is presumed to be unfair

⁸¹ See *Prinsloo v Van der Linde* at 776 (*supra*).

⁸² See par 6 4 2 2 and accompanying footnotes (*supra*).

⁸³ See *Jooste v Score Supermarkets Trading (Pty) Ltd* 1999 (2) SA 1 (CC) par 17. For an example of a law which failed the rational connection test, see *S v Ntuli* (*supra*) where section 309, read with section 305, of the Criminal Procedure Act 51 of 1977 differentiated between prisoners without legal representation and those with legal representation. Since the Act prevented prisoners without legal representation from pursuing appeals against their sentence or conviction without first obtaining a so-called “judge’s certificate requirement” (to the effect that a judge would certify that there were reasonable grounds for the appeal), the Constitutional Court found there was no rational basis for placing a burden on prisoners without legal representation that was not placed on any other criminal appellant.

⁸⁴ See par 6 4 2 3 and accompanying footnotes (*supra*).

⁸⁵ See J De Waal et al “Equality” in *Handbook* 181 at 193 (*supra*).

⁸⁶ See par 6 4 2 5 and accompanying footnotes (*infra*).

⁸⁷ See par 6 4 2 5 and accompanying footnotes (*infra*).

⁸⁸ See *Prinsloo v Van der Linde* at 773 (*supra*).

discrimination,⁸⁹ differentiation on an analogous ground must be shown by the complainant to constitute unfair discrimination. Therefore, when an enumerated ground is involved, a complainant must merely establish that the differentiation is based on one or more of the grounds listed under section 9(3). There is no need to prove that the differentiation in question impairs his or her fundamental dignity as a human being. But in instances where the differentiation is on an analogous ground, the unfairness of the discrimination must be shown as an impairment of the complainant's fundamental dignity.

The members of the Constitutional Court have unanimously embraced the idea that at its core, the equality clause serves to protect the dignity of the individual. The Constitutional Court's understanding of human dignity in relation to equality emanates from a decision of L'Heureux-Dube J of the Supreme Court of Canada in *Egan v The Queen In the Right of Canada; Attorney-General of Quebec*⁹⁰ where she analysed the purpose of section 15 of the Canadian Charter of Rights and Freedoms (which entrenches the right to equality)⁹¹ as follows:

"[t]his court has recognised that inherent human dignity is at the heart of individual rights in a free and democratic society in *Big M Drug Mart Ltd* (1985) 13 CRR 64 at 97 (*per* Dickson J (as he then was)). More than any other right in the *Charter*, s. 15 gives effect to this notion. Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter* means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that threaten them as less capable for no good reason, or that otherwise offend fundamental human dignity."⁹²

The South African Constitutional Court thus seems to propose that the equality guarantee protects individuals from differentiation based on one or more of the specified grounds in section 9(3) or differentiation which has the potential to infringe on their fundamental human dignity. Conversely, where differentiation is not based on one or more of the enumerated grounds and where it does not have the potential to infringe on a person's fundamental human dignity, there will be no unfair discrimination in terms of section 9(3). This may appear to be a rather narrow conception of the harm of discrimination until one notes that the Constitutional Court employs a fairly broad and expansive (Canadian) definition of human dignity, namely any legally relevant differentiation that threatens people as "second-class citizens", "demean[s] them", "treat[s] them

⁸⁹ See section 9(5) of Act 108 of 1996 (*supra*).

⁹⁰ (1995) 29 CRR (2d) 79.

⁹¹ For the full text and a discussion of section 15 of the Canadian Charter of Rights and Freedoms, Constitution Act of 1982 Part I, see Chapter 4 of this dissertation par 4.4 and accompanying footnotes (*supra*).

⁹² *Egan v The Queen In the Right of Canada; Attorney-General of Quebec* at 104 - 105 (*supra*).

as less capable for no good reason" or otherwise offends "fundamental human dignity" or where it violates an individual's self-esteem and personal integrity.⁹³

The view whereby equality is inextricably linked to the concept of dignity has been reiterated in successive Constitutional Court judgments and employed to support the contention that unfair discrimination would mean "treating persons differently in a way which impairs their fundamental human dignity as human beings, who are inherent equal in dignity ... where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section [9(3)]."⁹⁴ The concept of human dignity as employed by the Constitutional Court thus seems closely linked to the idea that all human beings have equal moral worth, regardless of differences between them. The notion of human dignity does not, therefore, seem to operate as a rigid standard to determine unfair discrimination but rather as a guideline to capture the idea of humans as equally capable and equally deserving of "concern, respect and consideration."⁹⁵

The Constitutional Court confronted the issue of unfair as opposed to fair discrimination in a gender-specific context⁹⁶ in *President of the Republic of South Africa v Hugo*.⁹⁷ The matter arose

⁹³ See Albertyn and Goldblatt 1998 14 *SAJHR* 246 at 260 (*supra*).

⁹⁴ See *Prinsloo v Van der Linde* at 773 - 774 (*supra*).

⁹⁵ This formulation was first employed by the Supreme Court of Canada in relation to the right of equality in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 171 where the court observed that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised as human beings deserving of concern, respect, and consideration."

⁹⁶ For a good example that illustrates how the Constitutional Court addresses the distinction between unfair and fair discrimination in a *racial* context, see *Pretoria City Council Walker* (*supra*). In this case, the impact of two City Council policies on formerly exclusively white areas and the black townships of Atteridgeville and Mamelodi were examined. The Constitutional Court found that the consumption-based tariffs for water and electricity imposed in white residential areas as opposed to the flat rate system applicable in the two townships constituted indirect discrimination on the listed ground of race. Yet in the present instance the discrimination was not unfair since the complainant was a member of a racial group that had not been disadvantaged by past racial policies and practices. The Constitutional Court found that the cross-subsidisation was temporary and would be phased out once consumption-based tariffs were introduced in the two townships. There was consequently no invasion of the complainant's dignity, nor was he affected in a manner comparably serious to an invasion of his dignity.

⁹⁷ 1997 (6) BCLR 708 (CC).

when President Nelson Mandela granted a remission of sentence in 1994⁹⁸ to all mothers who were in prison and had children under the age of twelve years.⁹⁹ The respondent, a prisoner who was the father of a child under twelve, argued that the Presidential order unfairly discriminated against him on the basis of gender and thus constituted a violation of section 9(3) of the South African Constitution.

The Constitutional Court found that the presidential order indeed constituted discrimination on two grounds, namely "sex coupled with parenthood of children below the age of 12."¹⁰⁰ The first of these was a listed ground which meant that the Presidential order was to be considered unfair discrimination unless the contrary was proved. The majority of the Constitutional Court¹⁰¹ deemed it an unacceptable generalisation that mothers are primarily responsible for the nurturing and rearing of children in South African society. The court rightly pointed out that this

⁹⁸ The remission of sentence was granted under a document styled as Presidential Act No 17 dated June 27, 1994. The Presidential Act, *inter alia*, provided the following:

"In terms of section 82(1)(k) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby grant special remission of the remainder of their sentences to:

- all persons under the age of eighteen (18) years who were or would have been incarcerated on 10 May 1994; (except those who have escaped and are still at large)
- all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years;
- all disabled persons in prison on 10 May 1994 verified as disabled by a district surgeon.

Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiracy to commit such an offence:

- murder;
- culpable homicide;
- robbery with aggravating circumstances;
- assault with intent to do grievous bodily harm;
- child abuse;
- rape;
- any other crimes of a sexual nature; and
- trading in or cultivating dependance producing substances."

⁹⁹ Section 82(1) of Act 200 of 1993 (*supra*) set out the powers and functions that the President was competent to exercise and perform. Subsection (k) made provision for the President "to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures."

¹⁰⁰ At 725 (*supra*).

¹⁰¹ *Per* Goldstone J at 711 - 734 (*supra*). Didcott J concurred at 734 - 737 (*supra*) with the majority of the Constitutional Court in so far as allowing the appeal, but dissented from the proposal to substitute a declaration of validity which the court *a quo* had made.

generalisation imposes a tremendous burden upon women and is one of the root causes of women's inequality in society. The Constitutional Court argued that if the President had denied an opportunity to mothers which it afforded to fathers on the basis of this generalisation, his actions would have constituted unfair discrimination.¹⁰² In the present instance, however, the President did the exact opposite. He afforded an opportunity to mothers - on the basis of the generalisation - which he denied to fathers. And although this was discriminatory, it did not constitute unfair discrimination. The court found that the decision of the President benefited children and gave female prisoners with minor children an advantage with the result that the effect of the remission of sentence was to do more than deprive fathers of minor children of an early release to which they had no legal entitlement. And since there were far larger numbers of fathers in prison than mothers, the court agreed that the release of such large numbers of prisoners would have led to public outcry. It could not accordingly be argued that the decision not to afford male prisoners the same opportunity impaired their sense of dignity as human beings or their sense of equal worth. Indeed, it could be said that the purpose of the President's actions was to achieve a worthy and important societal goal which - as an act of mercy - was designed to benefit three groups of prisoners, namely disabled prisoners, young people and mothers of young children. The fact that these groups were regarded as particularly vulnerable in South African society, and that in the case of the disabled and young mothers they belonged to groups who had been victims of past discrimination, weighed with the Constitutional Court in concluding that the discrimination was not unfair.¹⁰³ The discrimination was against a class of individuals, namely fathers, who had not historically been subject to disadvantage.

In a dissenting judgment,¹⁰⁴ Mokgoro J held that to deny fathers release from prison on the basis of a stereotype about their aptitude in child rearing constituted an infringement of their equality and human dignity. She was not persuaded by arguments that mothers of young children were more disadvantaged than others in the penal system and consequently held that there was no correlation between the nature of the disadvantage and the measures taken to alleviate the disadvantage.¹⁰⁵ Mokgoro J thus concluded that the remission of sentence amounted to unfair discrimination.¹⁰⁶

¹⁰² At 728 (*supra*).

¹⁰³ At 734 (*supra*).

¹⁰⁴ At 746 - 753 (*supra*).

¹⁰⁵ At 753 (*supra*).

¹⁰⁶ Mokgoro J at 753 (*supra*) nevertheless found the infringement justifiable in the present instance under section 36 of Act 108 of 1996 (*supra*) largely for the reasons advanced by the majority of the Constitutional Court.

Kriegler J's dissenting judgment¹⁰⁷ was premised on a principled objection. While he accepted that the release of mothers was praiseworthy and likely to benefit some children, Kriegler J stressed that the essence of the equality clause was to end deeply-entrenched patterns of inequality in South African society. He argued that the stereotype that women were responsible for the nurturing and upbringing of children was primarily responsible for inhibiting the progress of women in society. As a consequence, the President - by releasing the mothers of minor children - was perpetuating a stereotype which was the main cause of the inequality suffered by women in South Africa. Kriegler J elaborated:

"In my view the notion relied on by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 [now section 9] and the other provisions mentioned above outlawing gender or sex discrimination were designed to undermine and not to perpetuate discrimination of this kind."¹⁰⁸

This led Kriegler J to conclude that since the benefits to a few were outweighed by the serious disadvantage to society as a whole, the discrimination in question was unfair and in conflict with section 8(2) of the Interim Constitution.¹⁰⁹

6 4 2 5 The Expressly Enumerated and Analogous Grounds of Differentiation and the Matter of Direct and Indirect Discrimination

Differentiation on the basis of one of the grounds expressly enumerated under section 9(3) of the South African Constitution is presumed to constitute unfair discrimination until the contrary is proved.¹¹⁰ There is accordingly a presumption that differentiation on one of the listed grounds will impose burdens on people who have been victims of past patterns of discrimination or will impair the fundamental dignity of those affected. In *Harksen v Lane NO*, the Constitutional Court explained that

"[w]hat the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds ... [t]he temptation to force them into neat self-contained categories should be resisted. Section [9(3)] seeks to prevent the

¹⁰⁷ At 737 - 746 (*supra*).

¹⁰⁸ At 743 (*supra*).

¹⁰⁹ Now section 9(3) of Act 108 of 1996 (*supra*).

¹¹⁰ See section 9(5) of Act 108 of 1996 (*supra*).

unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.”¹¹¹

Differentiation on a ground that is not on the list of presumably illegitimate grounds of differentiation under section 9(3) will constitute discrimination if it can be shown to be analogous to the expressly enumerated grounds. But since there is no presumption to aid the complainant(s) in the case of analogous grounds, it must be shown that the law or conduct on grounds other than those listed under section 9(3) is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.”¹¹²

The issue of enumerated as opposed to analogous grounds of differentiation demanded the Constitutional Court’s attention in *Harksen v Lane NO*.¹¹³ In this instance, the constitutional validity of section 21 of the Insolvency Act¹¹⁴ was at issue. Section 21 of the Insolvency Act provides that on the sequestration of the estate of an insolvent spouse, all the property of the solvent spouse vests in the trustee of the insolvent estate.¹¹⁵ The trustee may deal with the solvent spouse’s property as if it were property in the sequestrated estate, subject to certain safeguards allowing the solvent spouse to reclaim his or her property on proof that it is not the property of the insolvent spouse. Section 21 of the Insolvency Act therefore differentiates between solvent spouses and any other person who had dealings with the insolvent, because the section imposes a burden on the former group that it does not on the latter.

In determining whether the differentiation amounted to discrimination in the present instance, the court noted that marital status was not expressly listed as a ground of discrimination under

¹¹¹ Per Goldstone J at 1509 (*supra*).

¹¹² See *National Coalition for Gay & Lesbian Equality v Minister of Justice* par 20 - 21 (*supra*).

¹¹³ 1997 (11) BCLR 1489 (CC).

¹¹⁴ Act 24 of 1936.

¹¹⁵ Section 21 of Act 24 of 1936 (*supra*) reads:
 “The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property of the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section.”
 Section 21(13) of Act 24 of 1936 (*supra*) contains a number of provisions which were designed to protect the legitimate interests of the solvent spouse.

section 8(2) of the Interim Constitution. Discrimination on this ground could not, therefore, be presumed to be unfair. The Constitutional Court noted, however, that the differentiation in question arose from certain attributes or characteristics of the solvent spouse, namely his or her presumably close relationship with the insolvent spouse and the fact that the spouses usually live together in a common household. The court accordingly found that since these attributes had the potential to demean persons in their inherent human dignity, differentiation grounded on these attributes was discriminatory.¹¹⁶

The next aspect of the Constitutional Court's enquiry centred on whether the discrimination had an unfair impact on those affected by it. As I indicated above,¹¹⁷ a number of factors must be taken into account to determine whether discrimination has an unfair impact. The first is the position of the complainants in society and whether they have been victims of past patterns of discrimination. The Constitutional Court found, however, that solvent spouses had not suffered discrimination in the past and cannot therefore be deemed a vulnerable group.¹¹⁸ The second factor in assessing unfairness is the nature of the discriminating law or conduct and the purpose sought to be achieved by it. The Constitutional Court thus had to assess whether section 21 of the Insolvency Act sought to achieve a worthy and important societal goal. The court found that since the section is intended to protect the rights of the creditors of an insolvent estate, the section indeed has an important purpose which is not inconsistent with the values that underlie the equality clause.¹¹⁹

The third factor in assessing unfairness is the extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity. In this regard, the Constitutional Court stressed that the statutory vesting of the property of the solvent spouse did not have the consequences that such property was necessarily removed from the possession of the solvent spouse.¹²⁰ It was attached by the sheriff of the magistrates' court or by a deputy sheriff and is presumed to have been owned by the insolvent spouse until the solvent spouse adduces evidence to establish the contrary on a balance of probabilities. The effect is thus that the solvent spouse has not been divested of what was his or her property. In the event that the solvent spouse has to resort to litigation to reclaim the property, there is inconvenience and a degree of potential embarrassment should the litigation become public.

¹¹⁶ At 1514 (*supra*).

¹¹⁷ See par 6 4 2 1 and accompanying footnotes (*supra*).

¹¹⁸ At 1515 (*supra*).

¹¹⁹ At 1515 (*supra*).

¹²⁰ At 1515 (*supra*).

There is also inconvenience and a burden in that the solvent spouse will usually require legal assistance. Some solvent spouses may not have the funds to employ a lawyer and in that way may suffer further potential prejudice. But these conditions are, the court argued, the inevitable consequences of a dispute between a trustee of an insolvent estate and a solvent spouse in respect of ownership of property. The Constitutional Court thus concluded that the cumulative effect of these criteria - and in particular the impact of the inconvenience or prejudice on solvent spouses in the context of the Insolvency Act - did not justify the conclusion that section 21 constituted unfair discrimination.¹²¹ The kind of inconvenience and burden that a solvent spouse may suffer is not unlike that which any citizen may face when resorting to litigation. Such inconvenience or burden may indeed arise whenever a vindicatory claim is brought against a person in possession of property and consequently does not lead to an impairment of fundamental dignity or does not constitute an impairment of a comparably serious nature.¹²² The applicant had accordingly not established that section 21 of the Insolvency Act constituted unfair discrimination in terms of section 9(3) of the South African Constitution.¹²³ As a consequence, the matter was referred back to the court *a quo* to be dealt with in the light of the Constitutional Court's judgment.

Section 9(3) and 9(4) of the South African Constitution prohibits both direct and indirect discrimination. The prohibition of indirect unfair discrimination is based on the realisation that, even though the basis of differentiation may be *prima facie* innocent, the impact or effect of the differentiation is nevertheless discriminatory.¹²⁴ In other words, indirect discrimination occurs

¹²¹ At 1516 (*supra*).

¹²² At 1516 (*supra*).

¹²³ See also *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC) where the Constitutional Court found that a provincial regulation which prevented all non-citizens (and therefore the subcategory of permanent residents) from being appointed into permanent teaching posts constituted unfair discrimination. In this instance the ground for unfair discrimination was citizenship which - although not a listed ground under section 9(3) of Act 108 of 1996 (*supra*) - is suspect because it is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens targeted by the regulation. And since the measure was overbroad, the court found that its impact on non-citizens who were permanent residents could not be justified.

¹²⁴ See, for example, *CF Griggs v Duke Power Co* 401 US 424 (1971) at 432 where the United States Supreme Court found that the power company's condition of employment in or transfer to jobs - which required a high school diploma - indirectly had the effect of keeping black people out since disproportionately few black applicants were able to meet this requirement. The Supreme Court argued that "[g]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms but operates as built-in head winds for minority groups ... Congress directed the

when policies are applied which appear neutral, but which adversely affect a disproportionate number of individuals or groups of individuals. The Constitutional Court has on occasion held that the phrase "directly or indirectly" covers all possible forms of discrimination with the result that any law which has an unfair discriminatory effect or consequences, or which is unfairly administered, may amount to prohibited discrimination even where the law appears to be neutral and non-discriminatory.¹²⁵ Section 9(5) - which presumes discrimination on one or more of the listed grounds to be unfair discrimination - applies to both direct and indirect discrimination.¹²⁶ Whereas direct discrimination appears on the face of a law or conduct, the Constitutional Court has indicated that it will often be necessary to present evidence to show that a particular law or conduct has an indirect discriminatory effect or is administered in a discriminatory manner.¹²⁷

In the light of my discussion of the structure of the equality clause of the South African Constitution and the approach adopted by the Constitutional Court in its interpretation of the

thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation." Although this case dealt with Title VII of the Civil Rights Act of 1964, it is widely interpreted to represent an attempt by the United States Supreme Court to develop the concept of substantive equal protection.

¹²⁵ See *City Council of Pretoria v Walker* at 273 (*supra*). Although not always successful, cases of indirect discrimination have been recognised both by municipal and international courts. In *Binder v Canada* (1985) 23 DLR (4th) 481, for example, an employee of the Canadian National Railways, who was a member of the Sikh religion, complained that the company's requirement that workers wear hard hats was both a violation of his right to freedom of religion and *de facto* discrimination against persons of that religion. When the matter reached the Human Rights Committee, it found that although there was no violation of article 14 of the International Covenant of Civil and Political Rights, the Committee was prepared to entertain an application granted on grounds of indirect discrimination.

¹²⁶ At 274 (*supra*).

¹²⁷ See, for example, *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC) where the provisions of the Electoral Act 73 of 1998 which requires voters to use bar-coded identity documents were challenged in the run up to South Africa's second democratic elections in 1999 on the grounds that they were indirectly discriminatory. It was argued that although the provisions were neutral, their effect was to discriminate on, *inter alia*, the grounds of race, age and residence. This argument was based on a survey which indicated that most of the potential voters without the requisite identity documents were whites, rural dwellers and young people. The Constitutional Court held that although there was sufficient evidence to sustain an indirect discrimination challenge to the Electoral Act, that there was nothing to show that voters in the identified categories had in fact registered in smaller numbers than those outside the categories. And even if they had, this may well have been the result of voter education drives directed at voters outside the categories rather than the effect of the Electoral Act.

equality provisions, I shall now examine whether adult heterosexual pornography - conceptualised as a patriarchal practice of subordination - infringes women's constitutional stake in equality and human dignity.

6 4 3 Adult Heterosexual Pornography and the Rights to Equality and Human Dignity: Unfair Discrimination on the Basis of Sex?

As I have shown,¹²⁸ in analysing whether a law or conduct violates any part of section 9 of the South African Constitution, the Constitutional Court employs a three-stage enquiry. My assessment of whether adult heterosexual pornography constitutes an infringement of women's constitutional interest in equality and human dignity will accordingly follow the same scheme.

6 4 3 1 The First Stage of the Enquiry: An Assessment in terms of Section 9(1) of the South African Constitution

My discussion thus far has revealed that section 9 of the South African Constitution envisages two types of differentiation: legitimate differentiation as opposed to differentiation that is deemed discriminatory in the constitutional sense.¹²⁹ Consequently, section 9 conceives of equality in two distinct ways which find expression in sections 9(1) and 9(3) respectively. The Constitutional Court has interpreted section 9(1) to the effect that although mere differentiation will very rarely constitute unfair discrimination,¹³⁰ such differentiation may still fall foul of this subsection.¹³¹ Section 9(1) therefore has two aspects - first, that everybody is entitled to equal treatment by South African courts and secondly, that nobody should be above or beneath the law and all are subject to law or conduct impartially applied and administered.¹³² It follows that mere differentiation will fall foul of both aspects of section 9(1) if the state did not act in a rational manner when differentiating between individuals or groups of individuals. But the state may find this requirement relatively easy to satisfy. To my mind, the requirement of rationality is one

¹²⁸ See par 6 4 2 1 and accompanying footnotes (*supra*).

¹²⁹ See par 6 4 2 3 - 6 4 2 4 and accompanying footnotes (*supra*).

¹³⁰ See *Prinsloo v Van der Linde* at 770 - 771 (*supra*).

¹³¹ At 771 (*supra*).

¹³² At 771 (*supra*), relying on *S v Ntuli* at 150 (*supra*). See also *City Council of Pretoria v Walker* at 272 (*supra*) as well as par 6 4 2 3 and accompanying footnotes (*supra*).

which the state will certainly almost always be able to meet,¹³³ for the state merely has to show that the differentiation in question is in some way (rationally) related to a legitimate government interest or purpose. Seen from the vantage point of the complainant, the rational basis test consequently emerges as a rather stringent test which is virtually bound to frustrate a claim under section 9(1). The high threshold of the test is made even more apparent by the Constitutional Court's insistence that there is no need for the state to prove that the objective could have been achieved in a better or different way.¹³⁴ As long as a rational relationship (which in effect means the absence of arbitrariness)¹³⁵ is demonstrated between the purpose sought to be achieved by the impugned law or conduct and the means chosen by the state, the court will in all likelihood find that the differentiation does not infringe section 9(1).¹³⁶ The Constitutional Court's interpretation of section 9(1) therefore effectively compels complainants to frame their equality argument as one of discrimination in terms of section 9(3) of the South African Constitution instead. In what follows next, I shall attempt to show how the Constitutional Court's stringent standard in respect of section 9(1), coupled with the political nature of adult heterosexual pornography, effectively forces one to fashion an argument against pornography in terms of section 9(3) of the equality clause. To this end, I first need to examine whether adult heterosexual pornography differentiates between people or categories of people.

6 4 3 1 1 **Does Adult Heterosexual Pornography Differentiate between People or Categories of People?**

I explained in Chapter 2¹³⁷ that it is a fundamental insight of radical feminist thought that distinctions of gender, based on sex, structure virtually every aspect of our lives. Since these distinctions constitute an all-pervasive and unchallenged feature of our social reality and structure our entire social organization under patriarchy, gender becomes both the way in which women are socially differentiated from - and subordinated to - men. For radical feminism the problem of women's oppression is therefore situated in both gender and sex. And since the dialectical conception of the relation between human nature and human society could be said to challenge

¹³³ This certainly appears to be the case in United States and Canadian constitutional law: see Laurence Tribe *American Constitutional Law* (1988) at 1442 - 1443 (hereinafter referred to as *Constitutional Law*) and Gerald Beaudoin and Errol Mendes (eds) *The Canadian Charter of Rights and Freedoms* (1996) at 3 - 20. See also, in general, Woolman in M Chaskalson et al *Constitutional Law* par 12.5 - 12.10 (*supra*).

¹³⁴ See *Prinsloo v Van der Linde* at 775 (*supra*).

¹³⁵ See *Harksen v Lane NO* at 1513 (*supra*).

¹³⁶ See *Prinsloo v Van der Linde* at 776 (*supra*).

¹³⁷ See Chapter 2 of this dissertation par 2 4 and accompanying footnotes (*supra*).

the conceptual distinction between sex and gender, the sex/gender distinction becomes blurred in radical feminist theory. Moreover, by acknowledging that human biology (including human sexual biology) is not only partly created by society but that society also responds to human biology, radical feminism challenges the (traditional) conceptualisation of sex as a set of fixed biological characteristics and gender as the social attribute of being masculine or feminine.¹³⁸ Radical feminism thus views sexuality as fundamental to gender and biology as its social meaning in the system of sex inequality. Since sex is a social and political construct that does not rest independently on biological differences, sex is relevant to gender because it is itself partly created by gender. Radical feminism thus questions the notions of "sex" and "gender" because these are conceived as dialectically and inseparably interrelated. When situated within a radical feminist framework, an equality attack on adult heterosexual pornography can therefore be launched on the expressly enumerated grounds of gender as well as sex.

Since female sexuality is shaped under conditions of gender inequality in patriarchal society, female sexuality is moulded as a social construct out of women's social conditions of oppression and inequality. And since pornography implicates women's sexuality, it becomes the means through which gender inequality becomes sexual. Through the process of (sexual) objectification, adult heterosexual pornography imposes a social meaning on women as a group, and it is this meaning which constitutes the basis of differentiation. To phrase it differently, as a patriarchal practice, pornography sexually objectifies women while it does not impact on men in the same manner. This dialectic constitutes the basis of the differentiation that is inherent to adult heterosexual pornography. And just as the public display of sexually suggestive objects or pictures in the workplace has been understood to constitute a hostile work environment for female employees (and may in appropriate circumstances constitute sexual harassment)¹³⁹ pornography creates a hostile social environment for women in public as well as private life. Adult heterosexuality thus impacts on the cultural acceptance of the ideal of equality for women, thereby bringing into question women's right to equality before and equal protection and benefit of the law. By imposing a social meaning on women, adult heterosexual pornography serves to diminish the reputation of women as a group, to deprive women of their credibility, social and

¹³⁸ The traditional notion that "sex is a biological term; gender a psychological and cultural one" has, however, been cited with approval on various occasions in South African equality jurisprudence: see, in particular, Denise Meyerson "Sexual Equality and the Law" 1993 9 *SAJHR* 237 n 48 and Dennis Davis "Equality and Equal Protection" in D van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (1996) 196 at 208 (hereinafter referred to as *Rights and Constitutionalism*).

¹³⁹ See Carla Sutherland "Paying for Stolen Kisses?" in S Bazilli (ed) *Putting Women on the Agenda* (1991) at 194. On the issue of sexual harassment in the workplace, see also *Brooms v Regal Tube Co* 881 F 2d 412 (Seventh Circuit) (1989).

self-worth and to undermine women's access to the enjoyment of other constitutional rights.¹⁴⁰ In this respect, adult heterosexual pornography falls foul of section 9(1) of the South African Constitution. As pointed out above,¹⁴¹ the question whether this differentiation bears a rational connection to a legitimate (state) purpose must be examined next.

6 4 3 1 2 **Does the Differentiation Bear a Rational Connection to a Legitimate (State) Purpose?**

The question whether the differentiation which is inherent to adult heterosexual pornography bears a rational connection to a legitimate state (or political) purpose can be approached from two distinct positions. If framed within a larger liberal paradigm, considerations which are typically seen to underpin an open, free and democratic society will compel a court to balance competing (constitutional) interests and thus exercise a value judgment. As in the case of United States First Amendment obscenity jurisprudence, the values which underscore freedom of expression, coupled with the (constitutional) rights and interests of the individual, are likely to be presented as justification for the differentiation in question. Seen in this context, it may prove relatively simple to argue that the purpose of adult heterosexual pornography is a legitimate one in a free and democratic society and that the differentiation in question thus bears a rational connection to that purpose. But what would the constitutional outcome be when pornography is situated within a radical feminist paradigm and framed as a patriarchal structure of subordination? Can the (state/political) purpose of pornography still be seen as a legitimate one and will the differentiation facilitated by pornography accordingly satisfy the rational connection standard imposed by the Constitutional Court in respect of section 9(1) of the South African Constitution?

As my discussion in Chapter 2 revealed,¹⁴² radical feminism proceeds from the premise that our entire social, legal and political organization is patriarchal. The oppression of women is therefore viewed as the most fundamental and universal form of domination under patriarchy. Since the relationship between men and women is conceived to be based on power, it takes the form of male domination of women in all areas of life. Consequently no aspect of life lacks a political dimension, with the result that male power is not confined to the "public" worlds of politics and employment, but extends into private life. Male domination is therefore so pervasive that it is present in the state, the economic system, the family, in human reproduction, in

¹⁴⁰ See also the *amicus curiae* brief presented by the Women's Legal Education and Action Fund in *Regina v Butler* [1992] 1 SCR 452; 89 DLR (4th) 449 which was discussed in Chapter 4 of this dissertation par 4 3, especially par 4 3 1 - 4 3 5 and accompanying footnotes (*supra*).

¹⁴¹ See par 6 4 2 1 and par 6 4 2 3 and accompanying footnotes (*supra*).

¹⁴² See Chapter 2 of this dissertation par 2 4 and accompanying footnotes (*supra*).

language, knowledge, sexuality and in sexual violence, all of which are conceptualised as structures of patriarchy. These structures of patriarchy have in common the social, legal and political subjugation of women. As part of a universal, ubiquitous system of male domination, pornography plays a fundamental role in the sexually based subordination of women. Together with other structures of male dominance pornography serves to maintain patriarchy and the power difference between the sexes through the process of sexual objectification. By constructing female (sexual) identity, pornography serves a distinct (patriarchal) purpose which is both legitimised through and maintained by the process of conditioning, socialisation and education.¹⁴³ The level at which adult heterosexual pornography differentiates between men and women in an ubiquitous system of male dominance could thus well be said to bear a rational connection to the (political/state) purpose served by pornography. In fact, the sexual objectification of women through and in adult heterosexual pornography is a rational consequence of the politics of patriarchy.¹⁴⁴ It follows that because it could be argued that the differentiation in question indeed bears a rational connection to a legitimate political purpose (which is to subordinate women to men in all spheres of our social design), adult heterosexual pornography as a patriarchal practice does not constitute a violation of section 9(1) of the South African Constitution. However, the Constitutional Court has held that even if the differentiation does bear a rational connection to a legitimate political purpose, it might nevertheless constitute unfair discrimination for the purpose of section 9(3) of the South African Constitution. Therefore, since the level at which adult heterosexual pornography differentiates between men and women cannot be seen as arbitrary under a patriarchal social and legal design, I must accordingly proceed to consider whether pornography will fall foul of the second stage of the enquiry which the Constitutional Court has identified in respect of the equality clause.

6 4 3 2 The Second Stage of the Enquiry: An Assessment of Adult Heterosexual Pornography in terms of Section 9(3) of the South African Constitution

My discussion of the Constitutional Court's interpretation of section 9(3) revealed that a two-stage analysis must be followed.¹⁴⁵ To this end, a court must first ascertain whether the differentiation in question amounts to "discrimination", whereafter - if found to be the case - it must determine whether such differentiation constitutes "unfair" discrimination.

¹⁴³ On the impact of social conditioning in relation to violence against women, see also par 6 5 4 and accompanying footnotes (*infra*).

¹⁴⁴ See, in particular, MacKinnon "Not a Moral Issue" in *Feminism Unmodified* 146 at 152 - 153 (*supra*). See also Bartlett "Nonsubordination: Women's Rights and Power in the Liberal State" in *Gender and Law* 413 at 427 - 428 (*supra*).

¹⁴⁵ See par 6 4 2 1 and accompanying footnotes (*supra*).

6 4 3 2 1 Does the Differentiation Amount to "Discrimination"?

As pointed out by the Constitutional Court in *Prinsloo v Van der Linde*,¹⁴⁶ the term "discrimination" has acquired a particular pejorative meaning in South Africa given our legal and political history. The notion of discrimination accordingly relates to the unequal treatment of people on the basis of certain unique attributes and characteristics.

Section 9(3) of the South African Constitution contemplates two categories of discrimination. The first is differentiation on one or more of the seventeen grounds specified in the subsection and the second is differentiation on a ground that is not listed in subsection (3), but which is analogous to such ground. As pointed out in *Harksen v Lane NO*,¹⁴⁷ if the differentiation is not on a specified ground, the question of discrimination will depend on whether the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. However, if the differentiation is on a ground expressly enumerated in section 9(3), discrimination will have been established. Applied to adult heterosexual pornography, it follows that had the differentiation not been on two listed grounds, the question whether the level at which pornography differentiates between men and women amounts to "discrimination" directs one to establish whether pornography relates to the unequal treatment of women on the basis of attributes and characteristics attached to women as a group.

I argued above¹⁴⁸ that female sexuality is moulded as a social construct based on women's social conditions of oppression and inequality. Within this context, pornography - as a pervasive patriarchal system or practice - implicates women's sexuality and thus becomes the means through and in which gender inequality becomes sexual. Adult heterosexual pornography therefore forges female sexuality and female sexual identity through the process of sexual objectification. It is on this basis, I believe, that adult heterosexual pornography constitutes the unequal treatment of women as a group, for it both imposes certain (sexual) attributes and characteristics upon women and portrays women as objects who possess fixed stereotypical sexual qualities. This is not merely made possible through, but is indeed sustained by, our patriarchal social design. Pornography thus amounts to discrimination against women on the

¹⁴⁶ At 773 (*supra*).

¹⁴⁷ At 1508 (*supra*).

¹⁴⁸ See par 6 4 3 1 1 and accompanying footnotes (*supra*). See also Chapter 2 of this dissertation par 2 4 and accompanying footnotes (*supra*).

dialectically and inseparably interrelated grounds of gender and sex.¹⁴⁹ And since the differentiation in this instance is based on two expressly enumerated grounds, discrimination will have been established. The question whether this discrimination also constitutes “unfair” discrimination in the constitutional sense will be examined next.

6 4 3 2 2 **If the Differentiation Amounts to “Discrimination”, Does It Constitute “Unfair Discrimination”?**

The constitutional requirement that discrimination must be “unfair” necessitates the interpretation of the notion of unfairness. All discrimination will not necessarily be unfair and in light of South Africa’s history of institutionalised discrimination, oppression and subjugation, law or conduct designed to redress the imbalance created by past discrimination¹⁵⁰ will obviously not be deemed unfair in the constitutional sense. The nature of the notion of unfairness as contemplated in section 8 of the Interim Constitution was considered by the majority of the Constitutional Court in *President of the Republic of South Africa v Hugo*.¹⁵¹ The court argued that unfairness seeks to avoid discrimination against people who are members of (previously) *disadvantaged* groups. Constitutionally unacceptable discrimination (in other words “unfair” discrimination) is thus understood by the Constitutional Court within the social, legal and political context of South African society.¹⁵² This is underscored by the fact that the court has acknowledged that at the heart of the prohibition of unfair discrimination, lies the recognition that the purpose of the South African constitutional and democratic order¹⁵³ is the establishment of a society in which all human beings will be accorded *equal dignity and respect* regardless of their membership of particular groups.¹⁵⁴ The goal of the South African Constitution is thus the achievement of such a society. The notion of unfairness therefore requires a court to consider three things. First, the socio-political status or position of the group that has been disadvantaged; secondly, the nature of the power in terms of which the discrimination was effected and finally, the nature of the interests which have been affected by the discrimination in question. These factors, when applied

¹⁴⁹ On the significance of this, see par 6 4 3 1 1 and accompanying footnotes (*supra*).

¹⁵⁰ See par 6 4 1 and accompanying footnotes (*supra*).

¹⁵¹ At 729 - 730 (*supra*).

¹⁵² For more on contextual interpretation as hermeneutical guideline for constitutional interpretation, see Chapter 1 of this dissertation par 1 3, especially par 1 3 1 5 and accompanying footnotes (*supra*).

¹⁵³ For more on a purpose-seeking or teleological approach to constitutional interpretation, see Chapter 1 of this dissertation par 1 3, especially par 1 3 1 2 and accompanying footnotes (*supra*).

¹⁵⁴ At 730 (*supra*).

to adult heterosexual pornography, will therefore direct a court to examine the role that pornography plays in the construction of women's social and political status. In other words, a court will need to assess pornography in terms of sex discrimination and the construction of women's sexual inequality under patriarchy.

It is no mere coincidence that in a male dominated society adult heterosexual pornography - like prostitution, nursing, teaching, catering, domestic and factory work - constitutes one of the traditional areas of employment towards which women gravitate. Women's limited opportunities as a result of sexism and sex discrimination often leave them with little alternative but to consider low-paying jobs which exploit the attributes and characteristics which women are typically seen to possess. I argued above¹⁵⁵ that adult heterosexual pornography constructs its own specific version of the typical sexual attributes and sexual characteristics that are deemed attractive in women. To this end, adult heterosexual pornography constructs women as sexual objects specifically for the titillation and sexual gratification of men. This explains why women are presented in pornography as sexually voracious and insatiable, enjoying - and even seeking - brutal sexual violence and humiliation. Reduced to sexual body parts, and often reduced to animals in the language of pornography, women are dehumanised as objects, playthings, pieces of meat and consequently become pets, pussys, bunnies, beavers, bitches and cunts. As Susan Brownmiller so eloquently observes

"[in pornography] our bodies are being stripped, exposed and contorted for the purpose of ridicule to bolster that 'masculine esteem' which gets its kick and sense of power from viewing females as anonymous, panting playthings, adult toys, dehumanized objects to be used, abused, broken and discarded."¹⁵⁶

Sexual objectification thus subordinates women, as does the presentation of women as sexually passive, servile and violated. Susan Cole rightly links subordination to the idea of inequality and oppression. She argues that by

"[d]efining pornography as a practice of subordination embodies the harm, the negative, in the very definition. Subordination means that someone is being made less than someone else. It contains connotations of inequality and oppression. Where there is a presentation of sexual subordination for sexual pleasure, there is pornography. Where there is no sexual subordination in a presentation, there is no pornography."¹⁵⁷

In pornography, women's subordination is both sexually explicit and sexualised, for pornography conditions male sexual arousal and climax to female sexual objectification and subordination.

¹⁵⁵ See par 6 4 3 1 1 and accompanying footnotes (*supra*).

¹⁵⁶ See *Against Our Will: Men, Women and Rape* (1976) at 394.

¹⁵⁷ See "Pornography" in *Pornography and the Sex Crisis* (1992) 17 at 24 - 25 (hereinafter referred to as *Pornography*).

This means that through adult heterosexual pornography, men experience the sexual subordination of women as normal sex and construe subordination as sexually exciting and arousing, or in the words of Catharine MacKinnon, "[p]ornography makes hierarchy sexy."¹⁵⁸ Since pornography is what makes the subordination of women sexy, the subordination to which women are subjected in and through pornography cannot function without hierarchy, objectification, the dynamic of dominance and submission and sometimes even sexual violence.¹⁵⁹ By establishing a physical and emotional association between sexual inequality and sexual arousal, and by communicating that "women's worth is their sexual value alone,"¹⁶⁰ pornography puts a (sexual) price tag on women's worth. Apart from constructing powerful subject positions, adult heterosexual pornography - together with other forms of what Catherine Itzin refers to as "sex-objectified, sex-stereotyped presentations" - also plays a part in the social and psychological conditioning of all men by constructing the male view of (female) sexuality as the norm and thereby maintaining the pervasive system of male power. Itzin elaborates:

"[p]ornography presents to men how it is permissible to look at and to see women. *It relentlessly communicates: this is what women are, this is what women want, this is how women deserve to be treated.* It educates men in what it communicates. Men learn to see women in terms of their sexuality and sexual inequality as presented in pornography."¹⁶¹

The problem at the root of the sexual assault, rape, wife battering and the sexual harassment of women, including efforts to maintain women in unequal opportunities and conditions and to treat them as (sexual) objects for conquest, is to be found in the manner in which women's social worth is construed. Sexually explicit material that depicts women as existing solely for the sexual satisfaction of men, that depicts women in subordinate roles in their sexual relations with men and that depicts women engaged in sexual practices that would be considered humiliating, both create and reinforce the view that women's function is to satisfy the sexual needs of men. Materials such as these are likely to have pervasive effects on the treatment of women in society even far beyond the incidence of identifiable acts of rape and other sexual violence. To perpetuate the notion that women are always available for sexual domination, coupled with the idea that women *ought to* subordinate their own desires and beings to the sexual satisfaction of men, *must* impact on the manner in which women are both viewed by and treated in society. And

¹⁵⁸ See "Pornography, Civil Rights and Speech" 1985 *Harvard Civil Rights - Civil Liberties Law Review* at 17.

¹⁵⁹ See Andrea Dworkin "Against the Male Flood: Censorship, Pornography, and Equality" 1985 8 *Harvard Women's Law Journal* 1 - 29.

¹⁶⁰ See Cole "Feminist Criteria for Anti-Pornography Law" in *Pornography* 61 at 67 (*supra*).

¹⁶¹ See "Pornography and the Social Construction of Sexual Inequality" in C Itzin (ed) *Pornography: Women, Violence and Civil Liberties* (1992) 57 at 67. My emphasis.

since pornography “makes authoritative a way of seeing and treating women”¹⁶² - a view of women that is made possible through, as well as entrenched by, male supremacy - pornography flies in the face of the constitutional and democratic ideal of a society in which all human beings will be accorded equal dignity and respect.

This leads me to an assessment of how the social construction of women’s sexual inequality and status in and through adult heterosexual pornography relates to the fundamental value of human dignity. I pointed out in my discussion of the Constitutional Court’s assessment of unfair discrimination¹⁶³ that the court views dignity as an underlying consideration in the determination of unfairness. In fact, the prohibition of unfair discrimination in the South African Constitution is seen to “provide a bulwark against invasions which impair human dignity.”¹⁶⁴ The significance of human dignity as fundamental constitutional value has been well emphasised by the Constitutional Court. As a core constitutional value human dignity has prompted the court to conceive of the right enshrined in section 10 of the South African Constitution¹⁶⁵ - together with the right to life¹⁶⁶ - as “the most important of all human rights.”¹⁶⁷ The Constitutional Court has moreover pointed out that the right to human dignity is inextricably linked to other fundamental rights. To this end, the court has argued that the constitutional recognition of a right to human dignity “is an acknowledgement of the intrinsic worth of human beings” since “human beings are entitled to be treated worthy of respect and concern,”¹⁶⁸ and even went so far as to conceive of the right to human dignity as “the *source* of all other personal rights in [the Bill of Rights].”¹⁶⁹ It follows that human dignity is not only fundamental to the idea of equality, but is also central to the proper protection of women’s right to personal freedom and security as well as protection against the advocacy of gender hatred. Consequently, the right to human dignity is not only of importance in the present (equality) context, but is also of particular significance in relation to

¹⁶² See MacKinnon “Linda’s Life and Andrea’s Work” in *Feminism Unmodified* 127 at 130 (*supra*).

¹⁶³ See par 6 4 2 4 and accompanying footnotes (*supra*).

¹⁶⁴ In *Harksen v Lane NO* at 1510 (*supra*).

¹⁶⁵ Section 10 of Act 108 of 1996 (*supra*) reads:
“Human dignity
 10 Everyone has inherent dignity and the right to have their dignity respected and protected.”

¹⁶⁶ See section 11 of Act 108 of 1996 (*supra*).

¹⁶⁷ In *S v Makwanyane* at 722 (*supra*). On the significance of this, see also par 6 5 1 and accompanying footnotes (*infra*).

¹⁶⁸ At 777 (*supra*).

¹⁶⁹ At 722 (*supra*). My emphasis.

my assessment of pornography in terms of the right to freedom and security of the person¹⁷⁰ and the constitutional prohibition on incitement to gender hatred.¹⁷¹

In spite of its unequivocal support for the constitutional significance of the right to human dignity, the Constitutional Court has acknowledged that the notion of dignity is not self-explanatory and accordingly requires precision and elaboration. In *President of the Republic of South Africa v Hugo*,¹⁷² the court argued that the determination of whether the differentiation in question could be regarded as unfair primarily focuses on the experience of the victim of discrimination. This means that the impact of the discrimination on the complainant becomes the determining factor in assessing the unfairness of the discrimination.¹⁷³ With the help of the Supreme Court of Canada,¹⁷⁴ the Constitutional Court has identified a number of factors which a court must consider to determine whether the discrimination impacts unfairly on the complainant(s). These factors include the position of the complainants in society and whether they have suffered from patterns of disadvantage in the past, whether the discrimination is on a specified ground or not, the nature of the power and the purpose sought to be achieved, the extent to which the discrimination has affected the rights or interests of the complainants and whether this has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature. In the Constitutional Court's view, the cumulative effect of all these factors, assessed objectively, will assist in giving precision and elaboration to the constitutional test of unfairness.¹⁷⁵

It follows that in order to determine whether the discriminatory practice of adult heterosexual pornography impacts on women *unfairly*, I must first consider the position of women in society and whether they have suffered as a group in the past from patterns of disadvantage.¹⁷⁶ I pointed out already that the (patriarchal) ideology of apartheid has both produced and entrenched various social evils, the most notable of which were systemic racial and sex discrimination, coupled with the marginalisation and subordination of women. I also showed in Chapter 1¹⁷⁷ that women in

¹⁷⁰ See par 6 5 and accompanying footnotes (*infra*).

¹⁷¹ See par 6 6 and accompanying footnotes (*infra*).

¹⁷² 1997 (6) BCLR 708 (CC).

¹⁷³ At 730 (*supra*).

¹⁷⁴ See *Egan v The Queen In the Right of Canada; Attorney-General of Quebec* at 113 - 113 (*supra*).

¹⁷⁵ See *Harksen v Lane NO* at 1510 - 1511 (*supra*).

¹⁷⁶ At 1510 (*supra*).

¹⁷⁷ See Chapter 1 of this dissertation par 1 4 and accompanying footnotes (*supra*).

South Africa - in spite of enjoying unprecedented political representation at both provincial and national level - have encountered levels of (sexual) violence in the last decade which have led social analysts and members of the medical profession to conclude that the incidence of violent crime against women have reached epidemic proportions in this country.¹⁷⁸ These conditions, coupled with the manner in which adult heterosexual pornography construes women's social value and status and South Africa's tortured history of discrimination, marginalisation and subjugation, accentuate the fact that women in South Africa have yet to enjoy an *effective* guarantee of their constitutional interests in equality, human dignity and physical integrity. Women as a group have therefore suffered from past patterns of disadvantage and their current social conditions show that they indeed continue to suffer structural disadvantage.

The question whether the differentiation under consideration is on a specified ground or not, coupled with an assessment of the nature of the power in terms of which the discrimination was affected and the purpose sought to be achieved by it,¹⁷⁹ brings into sharp relief the political impact of adult heterosexual pornography on the actual social realities of women. According to the Constitutional Court, the question whether the purpose sought to be achieved by the discrimination was aimed at achieving a worthy and important societal goal, such as the furthering of equality for all, could have a significant bearing on whether complainants have in fact suffered discrimination.¹⁸⁰ The nature of the power in terms of which the differentiation inherent in adult heterosexual pornography is affected and the purpose sought to be achieved by it must therefore be examined. I argued earlier in this paragraph¹⁸¹ that pornography stands absolutely central to the manner in which the state enforces the (dominant) male viewpoint and particularly the male view of women as sex(ual) objects. Consequently, adult heterosexual pornography is pivotal in creating and maintaining sex as a basis for discrimination. As MacKinnon so strikingly points out,

"[t]he question [Sigmund] Freud never asked is the question that defines sexuality in a feminist perspective: what do men want? Pornography provides the answer. Pornography permits men to have whatever they want sexually. It is their 'truth about sex.' It connects the centrality of visual objectification to both male sexual arousal and male models of knowledge and verification, objectivity with objectification."¹⁸²

¹⁷⁸ See also par 6 5 4 and accompanying footnotes (*infra*).

¹⁷⁹ At 1510 (*supra*).

¹⁸⁰ At 1510 (*supra*).

¹⁸¹ See also par 6 4 3 1 2 and accompanying footnotes (*supra*).

¹⁸² See "Sexuality, Pornography and Method: Pleasure under Patriarchy" 1989 99(2) *Ethics* at 326.

It is in this sense that pornography accentuates the all-encompassing nature of patriarchal power, a power that is not aimed at "achieving a worthy and important societal goal" such as the furthering of "equality for all."¹⁸³ In fact, in a male dominated society,

"[pornography] shows how men see the world, how in seeing it they access and possess it, and how this is an act of dominance over it. It shows what men want and gives it to them. From the testimony of the pornography, what men want is: women bound, women battered, women tortured, women humiliated, women degraded and defiled, women killed. Or, to be fair to the soft core, women sexually accessible, have-able, there for them, wanting to be taken and used, with perhaps just a little bondage. Each violation of women - rape, battery, prostitution, child sexual abuse, sexual harassment - is made sexuality, made sexy, fun, and liberating women's true nature in the pornography."¹⁸⁴

A further factor identified by the Constitutional Court to determine whether the differentiation in question is constitutionally unfair is the extent to which the discrimination affects the rights or interests of the complainant(s).¹⁸⁵ In a male dominated society, adult heterosexual pornography is both public and inescapable and as a powerful patriarchal practice, pornography constructs women's very (sexual) identity.¹⁸⁶ The inescapable and public nature as well as the social and political consequences of pornography are strikingly highlighted by Drucilla Cornell who argues that

"[p]ornography is a harm to women because it is inescapable and public. Do I have the choice to avoid pornography? Not if I choose to go out of my apartment in New York City. I cannot escape images which devalorize my 'sex', which appear everywhere, including the supermarket where I shop, the public transportation I ride, and wherever I might choose to buy my Coca-Cola. These images continuously assault my own self-conception, they portray my 'sex' as shameful, as something to be despised. They challenge my self-respect as a woman."¹⁸⁷

By virtue to its inescapable and public nature pornography creates a social reality which women are forced to confront on various levels and creates conditions which invariably lead to an impairment of their fundamental dignity. By being presented in positions of servility and display and by being reduced to body parts or animals, subordinated and objectified, adult heterosexual pornography constitutes a violation of women's constitutional interest in equality and the right to have their dignity respected and protected. These conditions undermine women's social status in that they confirm gender-specific stereotypes and prejudice. The resulting dehumanization and

¹⁸³ Per Goldstone J in *Harksen v Lane NO* at 1510 (*supra*).

¹⁸⁴ MacKinnon 1989 99(2) *Ethics* 326 - 327 (*supra*).

¹⁸⁵ At 1510 (*supra*).

¹⁸⁶ See par 6 4 3 1 2 and accompanying footnoted (*supra*).

¹⁸⁷ See "Sexual Difference, the Feminine, and Equivalency" in *Transformations: Recollective Imagination and Sexual Difference* (1993) 112 at 124 (hereinafter referred to as *Transformations*).

humiliation affect women on an individual as well as a group level. Cornell elaborates:

"I am violated [by pornography] in the specific sense that I am forced to confront the reality that my 'sex' has been denied its inviolability ... [w]hat I am forced to see in pornography is myself as being whose 'sex' is portrayed not only as violable, but 'there' for violation. The violation, then, is first in that I am forced to see what I do not want to look at, and second in the context of what I am forced to see. The symbolism of the woman in 'bits and pieces' whose body is not only inviolable, but is instead there to be violated, *attacks me right then and there when I am forced to see it*. It assaults my projected image of myself as an individual worthy of inviolability ... [this serves] to forcibly strip someone of their self-image."¹⁸⁸

When the cumulative effect¹⁸⁹ of all the factors which the Constitutional Court has identified to determine whether the differentiation in question is unfair are examined, it becomes evident that adult heterosexual pornography violates both the notion of unfairness and dignity as contemplated by section 9 and the right to have one's dignity respected and protected envisaged by section 10 of the South African Constitution. And since the (new) South African constitutional and democratic order seeks to avoid discrimination against people who are members of disadvantaged groups and wishes to establish a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups, the differentiation inherent in adult heterosexual pornography constitutes discrimination that is unfair within the constitutional meaning which this notion has acquired.

I pointed out in my discussion of the Constitutional Court's interpretation of section 9(3)¹⁹⁰ that once it has been established that the discrimination is unfair, the question whether it can nevertheless be justified under the limitation clause must be examined. I shall accordingly proceed with the final stage of my analysis of adult heterosexual pornography in relation to the equality clause in which I must determine whether pornography can be justified under section 36 of the South African Constitution.

6 4 3 3 The Final Stage of the Enquiry: Can Adult Heterosexual Pornography as Patriarchal Practice be Justified under Section 36 of the South African Constitution?

In *Harksen v Lane NO*,¹⁹¹ the Constitutional Court was somewhat sketchy on how the third stage of the enquiry under the equality clause would proceed once unfair discrimination has been

¹⁸⁸ See *Transformations* 112 at 125 (*supra*). Emphasis in the original.

¹⁸⁹ See *Harksen v Lane NO* at 1511 (*supra*).

¹⁹⁰ See par 6 4 2, especially par 6 4 2 2 and par 6 4 2 4 and accompanying footnotes (*supra*).

¹⁹¹ 1997 (11) BCLR 1489 (CC).

established. This could possibly be as a result of the fact that the court found the differentiation *in casu* not to have amounted to unfair discrimination. Although section 21 of the Insolvency Act¹⁹² clearly differentiated between solvent spouses and other persons with whom the insolvent spouse had dealings, the Constitutional Court found that this differentiation had a rational connection to a legitimate government purpose.¹⁹³ And since there was also no justification to conclude that the provisions of section 21 of the Insolvency Act constituted unfair discrimination, there was accordingly no violation of either section 8(1) or section 8(2) of the Interim Constitution.¹⁹⁴ To determine whether the practice of adult heterosexual pornography can be justified under section 36 of the South African Constitution, I shall have to rely on the observations of O'Regan J in *Harksen v Lane NO*.¹⁹⁵

In determining whether the test for justifiability set by the limitation clause is met, O'Regan J argued that the infringement of the equality clause must be weighed against the purpose and effect of the discrimination in question. It follows that in the case of adult heterosexual pornography, one must weigh the contravention of section 9(3) of the South African Constitution in terms of the purpose and effect of pornography as pervasive patriarchal practice. If pornography is found to constitute unfair discrimination, this would amount to a limitation of the right to equality which can only be justified under the limitation clause if the relationship between the purpose and effect of pornography is closely drawn. This means that if the (political) purpose of pornography is not closely drawn to the differentiation that pornography facilitates between men and women (in other words, if the differentiation is arbitrary), the requirements of the limitation clause will not be met.

The requirement that the differentiation must not be arbitrary would not seem to constitute a problem in the case of adult heterosexual pornography, particularly as I have shown above¹⁹⁶ how the level at which pornography differentiates between the sexes is inextricably related to the purpose of pornography in a male dominated society. Consequently, since the differentiation is closely drawn to the political object of adult heterosexual pornography, the legal norms which permit pornography in a patriarchal society could well be seen as a reasonable and justifiable limitation of the right to equality. However, I argued earlier in this chapter when I assessed the

¹⁹² Act 24 of 1936 (*supra*).

¹⁹³ At 1512 - 1514 (*supra*).

¹⁹⁴ Act 200 of 1993 (*supra*).

¹⁹⁵ At 1530 (*supra*).

¹⁹⁶ See par 6 4 3 1, especially par 6 4 3 1 1 - par 6 4 3 1 2 and accompanying footnotes (*supra*).

relationship between the equality clause and the limitation clause¹⁹⁷ that it remains difficult to see how differentiation that constitutes unfair discrimination in terms of section 9(3) can ever be justified in an open and democratic society based on the very values which aided the conclusion that the discrimination in question had been unfair in the first place. I accordingly find it perplexing that differentiation which has been shown to be based on "attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings"¹⁹⁸ can ever be reasonable and justifiable in a society based on the fundamental constitutional values of human dignity, equality and freedom and which is still ravaged by the effects of past unfair racist and sexist prejudice and discrimination.

6 4 4 To Summarise

My assessment of adult heterosexual pornography within the context of sections 9 and 10 of the South African Constitution has revealed that pornography differentiates between men and women in a gender-specific manner. It reduces women to sexual objects and thereby implicates section 9(1). However, in a male dominated society, it could be argued that pornography is rationally connected to a specific political purpose, with the result that pornography does not fall foul of the provisions of section 9(1). But the differentiation which is inherent in adult heterosexual pornography could be said to constitute discrimination which - within the context of section 9(3) of the equality clause and with specific reference to human dignity as fundamental constitutional value and right - amounts to unfair discrimination. I find it conceptually difficult, however, to conclude that the infringement of section 9(3) can nevertheless be justified under the limitation clause of the South African Constitution as reasonable and justifiable in an open and democratic society based on the core values of human dignity, equality and freedom.

Now that I have established that adult heterosexual pornography falls foul of section 9(3) of the South African Constitution, I shall continue my investigation into the (other) possible constitutional implications of pornography. To this end, I shall assess the practice of pornography in relation to the rights entrenched in section 12 of the South African Constitution in the next paragraph.

¹⁹⁷ See par 6 4 2 2 and accompanying footnotes (*supra*).

¹⁹⁸ At 1511 (*supra*).

65 ADULT HETEROSEXUAL PORNOGRAPHY AS PATRIARCHAL PRACTICE AND THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON

Section 12 of the South African Constitution combines a right to freedom and security of the person with a right to bodily and psychological integrity. Section 12 reads:

"Freedom and security of the person"

- 12 (1) Everyone has the right to freedom and security of the person, which includes the right -
- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right -
- (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent."

The right to freedom and security of the person played a prominent role in establishing South Africa's new constitutional order. Its predecessor, section 11(1) of the Interim Constitution,¹⁹⁹ was given detailed consideration by the Constitutional Court in no less than five decisions,²⁰⁰ whereas section 12 itself was decisive in an important decision of the court which was handed down in 1998.²⁰¹ My assessment of adult heterosexual pornography will not be directed to section 12 the South African Constitution as a whole, but will be confined to parts thereof instead. To this end, I shall consider the constitutional implications of pornography in relation

¹⁹⁹ Act 200 of 1993 (*supra*).

²⁰⁰ See *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC); *Ferreira v Levin NO* 1996 (1) BCLR 1 (CC); *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC); *Nel v Le Roux NO* 1996 (3) SA 562 (CC) and *S v Coetzee* 1997 (3) SA 527 (CC).

²⁰¹ See *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC). On section 11 of Act 200 of 1993 (*supra*), the predecessor to section 12 of Act 108 of 1996 (*supra*), see *Ferreira v Levin NO* (*supra*) and *Bernstein v Bester NO* (*supra*). For a critical evaluation of Ackermann J's opinion in *Ferreira v Levin NO* (*supra*), see Ian Currie "Judicial Avoidance" 1999 15 *SAJHR* 138 at 150 - 155.

to the rights to be free from violence,²⁰² not to be tortured²⁰³ and not to be treated in a cruel, inhuman or degrading way²⁰⁴ and the right to security in and control over one's body.²⁰⁵ My assessment of adult heterosexual pornography in relation to section 12 will proceed from two distinct angles. The first is intended to reveal the specific acts of (often extreme) violence and cruelty which are committed against women through pornography itself, such as acts of abuse, rape, torture and mutilation, including the so-called snuff films in which women are killed for male sexual satisfaction. The second will focus on the social impact of violent pornography on women as a group. In the latter instance the role of pornography in creating a culture of rape and other forms of sexual abuse, sustaining misogyny and enforcing negative gender stereotypes will be explored.

6 5 1 The Right to Freedom of the Person: Freedom from Violence, Torture and Cruel, Inhuman and Degrading Treatment

The right to be free from all forms of violence - a right entrenched in section 12(1)(c) of the South African Constitution - has no direct equivalent in the Interim Constitution, but can be seen as a component (or an amplification)²⁰⁶ of the right to security of the person. It is significant that whereas the right to security of the person in the Interim Constitution was vertical in its application, section 12(1)(c) operates both vertically and horizontally.²⁰⁷ This means that the right to be free from all forms of violence affords protection against invasions by the state as well as by private individuals. Since violence against an individual constitutes a grave invasion of personal security, section 12(1)(c) requires the state to protect individuals, both by refraining from such invasions itself and by restraining or discouraging private individuals from such invasions.

The right entrenched in section 12(1)(c) of the South African Constitution is fashioned after article 5 of the International Convention on the Elimination of All Forms of Racial

²⁰² See section 12(1)(c) of Act 108 of 1996 (*supra*).

²⁰³ See section 12(1)(d) of Act 108 of 1996 (*supra*).

²⁰⁴ See section 12(1)(e) of Act 108 of 1996 (*supra*).

²⁰⁵ See section 12(2)(b) of Act 108 of 1996 (*supra*).

²⁰⁶ See "Freedom and Security of the Person" in J de Waal et al *Handbook* 222 at 233 (*supra*).

²⁰⁷ On the significance of this, see par 6 4 2 n 48 (*supra*).

Discrimination.²⁰⁸ The article places obligations on states to prohibit and eliminate racial discrimination and promote understanding among races by providing a guarantee of equality before the law. In particular, article 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination refers to the "right to security of the person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution."²⁰⁹ Although section 12(1)(c) of the South African Constitution is not restricted to racist violence, the International Convention can serve as useful comparative tool for the interpretation of this right, particularly in relation to the obligation that the right imposes on the state to prevent violence from private sources. The International Convention on the Elimination of All Forms of Racial Discrimination suggests that a right to freedom from private violence also requires the state to effectively punish violence where it has occurred and to discourage the future perpetration of violence.

The rights not to be tortured or treated in a cruel, inhuman or degrading way in sections 12(1)(d) and 12(1)(e) respectively were similarly entrenched in section 11(2) of the Interim Constitution. The constitutional prohibition of cruel, inhuman or degrading punishment²¹⁰ has been considered by the South African Constitutional Court in respect of capital punishment, juvenile whippings and corporal punishment. In *S v Makwanyane*,²¹¹ the court was called upon to give thought to the constitutional implications of capital punishment. In a judgment of no less than fifty pages in which extensive use was made of comparative constitutional case law,²¹² the Constitutional Court unanimously concluded that capital punishment constituted cruel, inhuman and degrading punishment. The court based its decision against capital punishment on four primary grounds. First, the almost inherent arbitrariness in sentencing,²¹³ secondly, the failure of the sentence to

²⁰⁸ United Nations General Assembly Resolution 2106 A(XX) of December 21, 1965. The International Convention on the Elimination of All Forms of Racial Discrimination entered into force on January 4, 1966.

²⁰⁹ See also article 5 of the Universal Declaration of Human Rights which likewise provides that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

²¹⁰ The Republic of South Africa ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on December 10, 1998.

²¹¹ 1995 (6) BCLR 665 (CC).

²¹² All the other members of the Constitutional Court concurred with the decision of Chaskalson J in separate judgments at 725 - 791 (*supra*). Liberal use was made throughout of United States, Canadian, German, African and Southern African constitutional law.

²¹³ At 693 - 695; 706; 742 - 743; 761 - 762 and 782 (*supra*).

treat the guilty party as a human being worthy of respect,²¹⁴ thirdly, the irremediable nature of the punishment²¹⁵ and finally, the cruelty that inevitably flows from the indeterminable delays which convicted individuals face when awaiting execution and often the nature of the execution itself.²¹⁶

The state argued that capital punishment was a justifiable limitation to the right not to be subject to cruel, inhuman or degrading punishment on the basis that it was a deterrent, a preventative measure and a legitimate form of retribution. The Constitutional Court rejected all three of these arguments as justifiable limit. The court found, in the first instance, that there was no compelling evidence that the death penalty served as a deterrent, or that it was a better deterrent than life imprisonment.²¹⁷ Secondly, since no evidence existed that the death penalty was a better preventative measure than life imprisonment, the latter was to be preferred as the measure which least impaired the right in question.²¹⁸ Thirdly, while the court accepted retribution as a legitimate object of punishment, it held that retribution is not to be given undue weight in our constitutional order.²¹⁹ Indeed, in a society committed to the African philosophy of *ubuntu*, the court found that the primary object of punishment was prevention and rehabilitation, not revenge.²²⁰ In the words of Langa J,

“[t]he dominant theme of the culture [of *ubuntu*] is that the life of another person is at least as valuable as one’s own. Respect for the dignity of every person is integral to this concept ... [t]reatment that is cruel, inhuman or degrading is bereft of *ubuntu*.”²²¹

The matter of juvenile whippings came under the constitutional spotlight in *S v Williams*.²²² In this case the Constitutional Court experienced little difficulty in finding that the whipping of juveniles constituted cruel, inhuman or degrading punishment. The court articulated the dehumanising nature of whippings as follows:

²¹⁴ At 695 - 701 (*supra*).

²¹⁵ At 693 - 695; 706; 742 - 743; 761 - 762 and 782 (*supra*).

²¹⁶ At 733 - 737 and 774 (*supra*).

²¹⁷ At 716 - 717; 737 - 738; 746; 748 - 749; 764 - 767 and 774 (*supra*).

²¹⁸ At 717 (*supra*).

²¹⁹ At 717 - 718 and 753 (*supra*).

²²⁰ At 718; 751 - 752; 755; 758 - 759; 767; 771 - 773 and 780 - 781 (*supra*).

²²¹ At 752 (*supra*).

²²² 1995 (3) SA 632 (CC).

"[t]he severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding ... [t]he whipping ... is, in itself, a severe affront to [his] dignity as [a] human being."²²³

The state argued, however, that juvenile whipping constituted a justifiable limitation to the right not to be subject to cruel, inhuman or degrading punishment on the basis that it was an effective deterrent and an important, convenient and beneficial alternative to other forms of punishment. But the Constitutional Court rejected both arguments advanced by the state to justify a limitation to the right in question. It held that while there may be evidence to show that whipping had some deterrent effect on juvenile criminal behaviour, this was not sufficient to warrant overriding a constitutionally entrenched right. The court also held that juvenile whipping was unjustifiable given the fact that other creative sentencing options are available and that such an outdated mode of punishment failed to comply with the constitutional commitment to break with South Africa's violent past and to move forward to a more caring and humane society.

On this occasion, the arguments advanced and conclusions reached by the Constitutional Court spurred Parliament into action. In June 1997, Parliament adopted the Abolition of Corporal Punishment Act.²²⁴ The Act repeals or amends all remaining statutory provisions in terms of which corporal punishment may be imposed by a court of law or a court of traditional leaders. One year prior to the adoption of the Abolition of Corporal Punishment Act, Parliament passed the South African Schools Act.²²⁵ The constitutionality of section 10 of the Act - which clamps down on corporal punishment in schools²²⁶ and which equates corporal punishment with assault²²⁷ - was challenged in *Christian Education South Africa v Minister of Education*.²²⁸ In this instance, Parliament's decision to prohibit corporal punishment in schools was challenged on the basis that it violated the right of parents of children in independent schools who, in line with their religious convictions,²²⁹ had consented to the use of corporal punishment. The

²²³ Par 45 (*supra*).

²²⁴ Act 33 of 1997.

²²⁵ Act 84 of 1996.

²²⁶ See section 10(1) of Act 84 of 1996 (*supra*).

²²⁷ See section 10(2) of Act 84 of 1996 (*supra*).

²²⁸ 1999 (9) BCLR 951 (SE). For a useful comparison, see also *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS).

²²⁹ Apart from section 15 of Act 108 of 1996 (*supra*) which entrenches the right to freedom of religion, belief and opinion, the appellant also relied on section 14 (the right to privacy), section 29 (the right to establish and maintain

Minister of Education contended that it was the infliction of corporal punishment and not its prohibition which infringed constitutional rights. More particularly, he contended that the claim of the appellant to be entitled to a special exemption to administer corporal punishment was inconsistent with the rights to equality, human dignity and freedom and security of the person as well as the right of children to be protected from maltreatment, neglect, abuse or degradation which are all entrenched in the Bill of Rights in the South African Constitution.²³⁰ The Constitutional Court found that although parents have a general interest in leading their lives in a particular community setting according to their religious beliefs, and a more specific interest in directing the education of their children, the state has a legitimate interest in protecting pupils from degradation and indignity. By prohibiting corporal punishment in schools, section 10 of the South African Schools Act does not prevent schools from maintaining their specific Christian or other religious ethos. And since corporal punishment administered by a teacher in the detached institutional environment of a school is quite different from corporal punishment administered in the intimate home environment, the Constitutional Court concluded that the act of subjecting pupils to this form of punishment indeed constitutes cruel, inhuman or degrading treatment or punishment in conflict with section 12(1)(e) of the South African Constitution.

The right to bodily and psychological integrity entrenched under section 12(2) of the South African Constitution will be considered next.

6 5 2 The Right to Security of the Person: Security in and Control over One's Body

In relation to one's body, the right to freedom and security of the person creates a sphere of individual inviolability. Section 12(2)(b) of the South African Constitution conceives of this inviolability in two distinct ways, namely security in and control over one's body. These are not synonymous as the former denotes the protection of bodily integrity against intrusions by the state and others and the latter denotes the protection of what could be called bodily autonomy or self-determination against interference.

It would appear that section 12(2)(b) must be read with section 12(1)(c) which, as I have indicated above,²³¹ entrenches the right to be free from all forms of violence. Since bodily integrity is put in jeopardy by violence, there would appear to be no need to consider whether

independent educational institutions), section 30 (language and cultural rights) and section 31 (the right of cultural, religious and linguistic communities) which are guaranteed in the Bill of Rights.

²³⁰ See section 28 of Act 108 of 1996 (*supra*).

²³¹ See par 6 5 1 and accompanying footnotes (*supra*).

(violent) sexual assault constitutes an infringement of the right to bodily integrity. Once it has been determined that the bodily integrity is implicated, South African courts will be required to find criteria to distinguish justifiable from unjustifiable invasions. In United States constitutional jurisprudence a set of guidelines have emerged which could be useful to South African courts when pressed to interpret section 12(2)(b). So, for example, in the United States, a decision to invade bodily integrity must be procedurally regular so as to avoid arbitrariness. This means that close body searches in suspected drug related offences (or the like) must be grounded at least in a requirement of reasonable suspicion and, where possible, a deliberate invasion of bodily integrity must be preceded by a hearing even if only an informal one.²³² The principle of necessity should be observed, as should be the principle of proportionality.²³³

I shall now turn to an assessment of adult heterosexual pornography in relation to the specific aspects of section 12 of the South African Constitution as indicated above.²³⁴ To this end, I shall first comment on the specific acts of violence and cruelty committed against women through pornography itself whereafter I shall investigate the role of pornography in creating a culture of sexual abuse, sustaining misogyny and enforcing gender stereotypes and prejudice.

6 5 3 Adult heterosexual Pornography : The Gender-specific Violence and Abuse Revealed

There is compelling empirical evidence to the effect that the rape, abuse, torture and maiming of women forms an integral part of the production of adult heterosexual pornography.²³⁵ A cross-

²³² See *Constitutional Law* at 1332 (*supra*).

²³³ See *Winston v Lee* 470 US 753 (1985) where the United States Supreme Court held that the surgical removal (under general anaesthetic) of a bullet from a suspect to determine its origin under circumstances where the state had substantial evidence of the origins of the bullet from another source, violated the guarantee of due process of law contained in the Fifth Amendment to the United States Constitution.

²³⁴ See par 6 5 1 and 6 5 2 (*supra*).

²³⁵ Evidence of the violence that is endemic to the production of adult heterosexual pornography was adduced in the public hearings which were held in the cities of Minneapolis, Indianapolis and Los Angeles where anti-pornography ordinances were considered: see, in particular, MacKinnon "The Roar on the Other Side of Silence" in CA MacKinnon and A Dworkin (eds) *In Harm's Way: The Pornography Civil Rights Hearings* (1997) 3 - 24. Evidence of sexual violence in the production of pornography has also surfaced in the United Kingdom: see Liz Kelly and Maureen O'Hara "The Making of Pornography: An Act of Sexual Violence" 1990 213 *Spare Rib*. See also the detailed account of Linda Marciano (perhaps better known as Linda Lovelace) of *Deep Throat* fame in which she narrates the coercion, brutality, violence and degradation which is inextricably part of the production

selection of depictions which appear in mainstream sexually explicit publications such as *Hustler*, *Penthouse* and *Playboy* reveal horrific gender-specific acts of cruelty, torture, violence and inhuman or degrading treatment. Helen Longino elaborates:

“[w]hile the sexual objectification of women is common to all pornography, women are the recipients of even worse treatment in violent pornography, in which women characters are killed, tortured, gang-raped, mutilated, bound, and otherwise abused, as a means of providing sexual stimulation or pleasure to the male characters.”²³⁶

The use of cartoons in mainstream sexually explicit publications to convey misogynist messages constitutes an intriguing strategy. The depiction of gender-specific sexual assault, dehumanization and humiliation in the form of a cartoon seems to suggest that the sexual objectification and hurt that women suffer in pornography is both amusing and inconsequential. Yet this strategy does little to detract from the harmful effects and constitutional ramifications of sexist and misogynist jokes. In February 1983, for example, *Hustler* magazine published a cartoon which depicted a woman walking past a billboard which read: “if you have been raped or would like to be raped, call *Rape Line* 555-7675.” This cartoon is a good example of a strategy to trivialize rape and to ridicule the work done by rape counselling centres. It also serves to reinforce one of the most insidious of patriarchal myths (which also happens to be one of the most popular scenarios in adult heterosexual pornography) namely that women enjoy being raped and indeed actively seek to be raped. In a similar vein, *Playboy* magazine published a cartoon in April 1973 which depicted a woman shrinking away from two men who are in the process of removing their clothes with the caption: “[w]ell, I’m a consenting adult and Charley here is a consenting adult - that makes two out of three.” Although, in this instance, the woman is depicted as resisting the sexual intent of the two males, the cartoon mocks the notion of consensual sex and completely repudiates the idea that women have a right to security in and control over their body and a right not to be (sexually) violated.

Numerous depictions of gender-specific brutality and dehumanisation have appeared in mainstream sexually explicit publications. The following examples constitute but a small cross-selection. *Hustler* magazine carried a series of sexually explicit photographs entitled “Uses for Women”. The text which accompanied one particular photograph read: “[s]ince time began women have complained, ‘you’re just using me for sex!’ Don’t get the impression that *Hustler* magazine thinks of women only as sex objects. Women can be used for many other things.” The photograph in question depicted a naked woman bending over on a bar counter with a man holding a bottle near her exposed vagina with the caption “a handy bottle opener.” In March

Ordeal (1990) (Seracus New Jersey: Citadel Press).

²³⁶

See “What is Pornography?” in L Lederer (ed) *Take Back the Night* (1980) 40 at 42.

1984, *Swank* magazine carried a series of photographs entitled "Fireman's Ball" which contained scenes of sexual intercourse and oral sex between a man dressed as a fireman and the woman he had supposedly rescued. One photograph portrayed the naked woman spreading her legs, eagerly awaiting the insertion of a fire hose nozzle into her vagina. The depiction seems to suggest that women are insatiable nymphomaniacs who place sexual gratification before personal safety and enjoy being raped with improbable foreign objects.

A sexually explicit publication which specialises in depictions of Asian women, *Cherry Blossom*, carried a photography in March 1977 of a naked woman bending over with her genitals exposed. Behind her was a fully clothed man who held a burning cigarette to her buttock and a whip in his right hand. In similar vein, *Hustler* magazine carried a series of photographs entitled 'Dream Lover' in 1981. The series portrayed a naked woman brutally beaten by her "dream lover" with accompanying text which read: "[s]he senses that the erotic nature of the humiliation which he subjects her to." After being dragged by the hair to the bathroom, the woman's dream lover's experience culminates in having her head forcibly submerged in a toilet bowl, with the woman gasping for air. These depictions mock the radical feminist conception of erotica, trivializes torture through the title "dream lover" and reinforces the notion that women are sexually aroused by debasement and torture. Depictions of women in bondage are contained in sexually explicit magazines as a matter of course.²³⁷ Two examples will suffice. *Schakled* magazine carried a photograph of a naked woman with her legs spread, grappling with a chain around her neck while a man wearing boots kicked her exposed genitals. Large bruises were clearly visible on her right thigh and stomach. In 1983, *Take That Bitch* published a photograph of a partially naked woman in tight bondage and a fully clothed man with the caption: "[t]rue love reveals itself in many ways. If a guy ties his girlfriend in an excruciating position for long, painful hours, it shows he cares enough to want her to be a better person for the experience. Most girls appreciate this attention!" The message conveyed is that true heterosexual love can best be expressed by a man hurting the woman he "loves", for the measure of pain inflicted is indicative of the degree and depth of true heterosexual love.

A whole new genre of sexually explicit torture, mutilation and murder flooded the pornography market after 1979 with the release of the notorious *Snuff* movie which depicted a man ripping out a woman's uterus in the final scene, holding it up in the air while he ejaculated. Examples of subsequent depictions of sexual femicide (in other words, the misogynist killing of women by men for sexual gratification) in mainstream sexually explicit publications include the following. On the June 1978 cover of *Hustler* magazine, the bottom half of a woman's naked body was

237

See, for example, *Playboy* December 1975, *Penthouse* June 1977, *Cherry Blossom* March 1977 and *Simone Devon* magazine August 1990 which presents itself as "celebrating the psychological power of the bound beauty whose love bondage is as much for her pleasure as ours."

depicted protruding from a meat grinder out of which ground up meat was oozing. The accompanying caption read: “[w]e will no longer hang women up like pieces of meat - Larry Flint.” Also in the woman-in-a-meat-grinder issue of *Hustler*, photographs appeared of a naked woman with her legs spread on a bed of lettuce in a hamburger bun and a naked woman bend over on a plate of spaghetti dripping with tomato ketchup. The caption accompanying both photographs read: “[g]rilled indoors or out, this pink patty takes two hands to handle.” Imagine the public outcry if similar graphic racist images of crudity, hatred and violence were published in a propagandist magazine published by a right wing political organisation. Yet in a male dominated society saturated with gender violence and brutality, images suggesting that women may be ground up and grilled, dripping with “blood” hardly cause a stir.

Two Japanese prints taken from *A Garden of Pain* depict the disembowelment of women in a sexual context in graphic detail. The text accompanying the first of these prints (which dates from the late fourteenth century) stated that the print depicted “a celebrated occurrence of the time” during which a woman is disembowelled with a large, sharp knife while a man watches and masturbates. The second print depicted the mutilated corpses of two women in the background hanging by their feet and the corpse of a woman which is in the process of being mutilated by a man. The latter is tied up with her arms behind her back and her legs spread wide open. Long needles protrude from her neck, some kind of torture device has been stuck up her anus and her shins have been cut open. With his right hand, the man is tearing off the corpse’s nipples while he plunges a sword into her vagina with his left hand so far that it exits through her stomach. I would like to conclude this portion of my discussion with a photograph which ranks as one of the most barbaric one is ever likely to encounter. It appeared in *Hustler* magazine of June 1990 and contained four photographs depicting women’s bodies which were attached with razor blades to what would appear to be a sheet of human skin. Also fastened to the piece of skin with fish hooks and safety pins were clitorises and nipples. The photograph fastened to the top left depicted a decapitated woman with severed hands. The photograph in the middle showed a woman whose left leg was blown away, her trunk ripped open. A knife is at her side. The top right photograph was splattered with blood and portrayed a dead woman at a toilet bowl. And the photograph fastened to the bottom of the piece of skin showed the severed trunk of a woman whose legs were amputated below the knees.

The question now arises: in what way are the depictions of rape, sexual violence and brutality that are commonly found in mainstream pornographic publications and films related to the culture of sexual violence and abuse that is a constituent feature of all patriarchal societies? This vexing question will be considered in the next paragraph.

6 5 4 Adult Heterosexual Pornography and its Role in a Culture of Gender-specific Sexual Violence and Abuse

United States,²¹⁹ Canadian²²⁰ and South African courts²²¹ have all conceded that it is a major point of contention whether there exists a direct causal link between pornography and instances of sexual violence against women. In spite of commendable efforts on the part of social scientists who conducted studies on the role of pornography in the rape and sexual abuse of women,²²⁵ the United States and South African experiences have shown that the courts refuse to entertain the notion that a direct *nexus* exists between violent pornography and the incidence of gender-specific sexual violence. Yet, these findings cannot be dismissed altogether either. I am of the view that studies which purport to show a link between violent pornography and the sexual abuse of women have considerable juridical value, given South Africa's particular socio-political climate.

In a male dominated society, women are sexually assaulted because they are *women* - not individually or at random, but on the basis of their sex and by virtue of their membership of a

²¹⁹ In *American Booksellers Association Inc v Hudnut* 771 F2d 323 (1985) at 327 - 328. See also Chapter 3 of this dissertation par 3 5 1, especially par 3 5 1 4 and accompanying footnotes (*supra*).

²²⁰ In *Regina v Butler* (1992) 89 DLR (4th) 449 at 478 - 479. See also Chapter 4 of this dissertation par 4 3 4, especially par 4 3 4 3 and accompanying footnotes (*supra*).

²²¹ In *Case: Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (CC) at 647. See also Chapter 5 of this dissertation par 5 4, especially par 5 4 2 and accompanying footnotes (*supra*).

²²⁵ Numerous social scientific studies have been undertaken to show a direct causal link between sexually violent depictions and the incidence of acts of sexual violence and brutality against women. The evidence typically emanates from anecdotal evidence consisting of reports of incidents in which a connection between pornography and criminal or coercive behaviour has been claimed, experimental evidence consisting of reports of experiments into people's responses after exposure to pornographic material and statistical evidence consisting of analyses of variations in crime statistics compared with variations in the availability of pornography. See, for example, Diana Russell "Research on How Women Experience the Impact of Pornography"; Edward Donnerstein and L Berkowitz "Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women"; Neil Malamuth and James Check "Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions"; and D Zillmann, J Bryant, PW Cominsky and NJ Medoff "Excitation and Hedonic Valence in the Effects of Erotica on Motivated Internal Aggression" in D Copp and S Wendell (eds) *Pornography and Censorship* (1983) at 213 - 217, 219 - 231, 133 - 255, 257 - 274 and 275 - 294 respectively. See also Chapter 3 of this dissertation par 3 4 4 n 168 (*supra*).

group defined by gender. The sexual violation of women by men symbolises and actualises women's subordinate social and political status to men. Sexual violence is thus both an indication and a practice of women's low status relative to men. Adult heterosexual pornography, which sexualises gender inequality, must - by virtue of its inescapable, public nature - be a major institution of socialisation into these gender definitive roles. The evidence suggests²²⁶ that women are targeted for intimate assault because at some point the gender-specific degradation, violation and domination becomes eroticised in a male dominated society. This could indeed be said to define the social meaning of female sexuality in societies where sex inequality is pervasive. Sexual assault - in all its manifestations - thus becomes a definitive act of sexualised power and masculinity under conditions of male supremacy. By sexualising violence against women (in other words, by connecting violence with sex and sexual arousal), pornography serves to perpetuate sexually legitimate violence against women. Under these conditions it becomes useful to focus on the possible *correlation* of sexually violent pornography with the sexual violence perpetrated against (and abuse of) women as a means to understand the role of adult heterosexual pornography in a climate of endemic (sexual) violence and abuse.

If one were to focus on the correlation between gender-specific sexually violent depictions and the sexual abuse of women, one is not purporting to show or prove direct (or factual) causality. Correlation suggests a *relationship* between one phenomenon and another. Correlation therefore establishes a *connection* between various phenomena.²²⁷ An effective way to illustrate the idea of correlation is with reference to the smoking of tobacco and heart disease and/or respiratory illnesses. There exists no direct causal link between the smoking of cigarettes and lung cancer or heart disease. Other variables and factors which also affect the respiratory and cardiac health of an individual over the course of a lifetime must be brought into the equation. It is accordingly not scientifically possible to prove a direct causal or factual link between the smoking of tobacco and the onset of lung cancer. To this end, medical research relies on the *correlation* between smoking and lung cancer. Due to the established correlation, it becomes possible to argue that it is *highly likely* that a link exists between the use of tobacco products and the onset of respiratory or heart disease. There exists an *appreciable risk of harm*, in other words. And this risk makes it reasonable to conclude that smoking is related to the onset of heart attacks and/or cancer of the respiratory tract. When this argument is applied to adult heterosexual pornography, it becomes reasonable to assume that depictions of sexually explicit violence and brutality in a context which suggests approval or endorsement of such acts or behaviour is a factor which contributes to the creation of a culture of gender-specific violence which, in turn, is likely to

²²⁶ See n 225 (*supra*).

²²⁷ See, in general, Catherine Itzin "Pornography and Civil Liberties: Freedom, Harm and Human Rights" in C Itzin (ed) *Pornography: Women, Violence and Civil Liberties* (1992) 553 at 559 and Diana Russell *Against Pornography: The Evidence of Harm* (1993) vii at x - xi.

promote or encourage similar behaviour in those exposed to such depictions.

I argued in Chapter 5 of this dissertation²²⁸ that South African courts (and the Constitutional Court in particular)²²⁹ need to recognise that the social context within which the constitutionality of adult heterosexual pornography must be decided is not exclusively that of a history of racist and sexist oppression. South Africa's history of oppression and inequality created a climate in which a welter of social evils could flourish, notably racial intolerance and (sexual) violence against women. Violence in South Africa is rife and gender-specific violence and brutality have reached epidemic proportions which Lloyd Vogelmann and Gillian Eagle have on occasion described as "endemic to South African society."²³⁰ The term "endemic violence" denotes that the rape, sexual assault and battery of women are widespread, common and deeply entrenched in our society. Gender violence in all its manifestations renders the ideal of equality and physical integrity as envisaged by section 12 of the South African Constitution illusory for South African women. As Brande Stellings correctly argues,

"sexual violence against women should be recognised as something more than an act of criminality: sexual violence is also an act of sex discrimination which deprives women of their civil rights."²³¹

In the Western Cape alone, more than four hundred cases of violence against women are reported each month in the magistrates' districts of Cape Town, Wynberg, Athlone and Bellville.²³² In addition, two out of every three women who receive medical treatment in the trauma unit of the Tygerberg Hospital are victims of assault by their husbands or other (male) family members. In view of the fact that eighty percent of violent acts against women are committed in their homes

²²⁸ See Chapter 5 of this dissertation par 5 5, especially par 5 5 1 and accompanying footnotes (*supra*).

²²⁹ For my critique of the Constitutional Court's failure to give due recognition to the social context within which the constitutional implications of adult heterosexual pornography must be decided in *Case; Curtis v Minister of Safety and Security* (*supra*), see Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 1 - 5 4 3 3 and accompanying footnotes (*supra*).

²³⁰ See "Overcoming Endemic Violence Against Women" 1991 18(1-2) *Social Justice* 209.

²³¹ See "The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship" 1993 28 *Harvard Civil Rights - Civil Liberties Law Review* 185 at 186. See also MacKinnon "Reflections of Sex Equality Under Law" 1991 100 *Yale Law Journal* 1281.

²³² See "Syfers oor geweld teen vroue skok" *Die Burger* November 25, 2000.

by men who supposedly love them,²³³ no less than thirty one thousand court orders have been issued between December 1993 and November 1997²³⁴ in terms of the Prevention of Family Violence Act.²³⁵ A study conducted by the Medical Research Council: Division of Women's Health concluded that violence is a learned or acquired behaviour.²³⁶ This suggests that violence is the product of social conditioning. In South African society the reported reasons for conflict indeed confirm an association - or a *correlation* - between violence against women and patriarchal conceptions of gender and sex roles. Conflict is mainly associated with attempts by men to control "their" women, "their" sexuality and "their" households. As Rachel Jewkes observes:

"[t]he data [collected] on the cultural context of gender relations confirms that South African society is immensely patriarchal. The findings that many women accept ideas that women are subservient to men in relationships is not surprising and should rather be seen as a testament to the 'success' of patriarchy. It would be difficult to see how men could continue to be abusive towards women if it were not for the fact that many women, at some level, perceive this as their entitlement and women as deserving this at times."²³⁷

Given this country's socio-political climate and evidence suggesting a correlation between violence against women and patriarchal conceptions of gender and sex roles, a compelling legal (or rather constitutional) argument can be formulated against violent pornography. If the Supreme Court of Canada is willing to accept that even non-violent sexually explicit material represents an appreciable risk of (social) harm to women (and thus to society as a whole),²³⁸ it is reasonable to argue that violent pornography is constitutionally reprehensible in light of the high incidence of acts of sexual violence and brutality committed against women in South Africa. Such an argument is indeed underscored by the fact that assertions of correlation are often

²³³ See Naeemah Abrahams in N Abrahams et al "I Do Not Believe in Democracy in the Home": Men's Relationships with and Abuse of Women" CERSA (Women's Health): Medical Research Council (1999) at 11 - 15.

²³⁴ See Rachel Jewkes et al "He must give me money, he mustn't beat me": Violence Against Women in Three South African Provinces" CERSA (Women's Health): Medical Research Council (1999) at 19.

²³⁵ See Jewkes et al CERSA (Women's Health): Medical Research Council at 22 (*supra*). The Prevention of Family Violence Act 133 of 1993 has since been repealed and replaced by the long awaited Domestic Violence Act 116 of 1998. The latter only entered into force on December 15, 1999, more than a year after its promulgation.

²³⁶ See Abrahams in N Abrahams CERSA (Women's Health): Medical Research Council at 16 (*supra*).

²³⁷ See Jewkes et al CERSA (Women's Health): Medical Research Council at 20 (*supra*).

²³⁸ *Per Sopinka J in Regina v Butler* [1992] 1 SCR 452 at 483.

employed in constitutional assessments, particularly in respect of issues pertaining to race and/or gender. It is highly unlikely that a (South African) court will, for example, insist on evidence of direct causality before it accepts that depictions of a violent and racist nature are constitutionally intolerable in that they constitute a threat to, *inter alia*, the right to security of the person and the right to psychological integrity. The actual socio-political conditions of women in South Africa - together with section 7 of the South African Constitution which demands that the "state must respect, protect, promote *and* fulfil the rights in the Bill of Rights"²³⁹ - lends further support to an argument against violent pornography in the light of the express recognition of the right to freedom and security of the person and the right to psychological integrity.

It is to be welcomed that the social and political unacceptability of acts of gender-specific violence and brutality in a sexually explicit context has been recognised by the South African legislature. My discussion of the provisions of the Films and Publications Act²⁴⁰ in Chapter 5²⁴¹ revealed that the Act prohibits depictions of "explicit violent sexual conduct", "explicit sexual conduct which degrades a person and which constitutes incitement to cause harm" and "explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm."²⁴² These statutory measures give due recognition to the actual social conditions of South African women and the very real *threat* of sexual violence. They also recognise the state's (constitutional) duty to protect women from all forms of violence as well as their bodily and psychological integrity - a duty which has been recognised by the South African Constitutional Court.²⁴³ In the light of South Africa's shameful history of discrimination, marginalisation and violence, it is reasonable to proscribe practices which condone the maltreatment, physical abuse and subjugation of certain groups in society on the basis that such acts and behaviour cannot be tolerated in a legal and constitutional order founded on the core values of equality, human dignity

²³⁹ See section 7(2) of Act 108 of 1996 (*supra*). My emphasis.

²⁴⁰ Act 65 of 1996.

²⁴¹ See Chapter 5 of this dissertation par 5 3 3, especially 5 3 3 1 - 5 3 3 3 and accompanying footnotes (*supra*).

²⁴² See Schedule 1 and Schedule 6 of Act 65 of 1996 (*supra*).

²⁴³ See *S v Baloyi* 2000 (1) BCLR 86 (CC). In this instance, the Constitutional Court declined to confirm the order of invalidity of section 3(5) of the Prevention of Family Violence Act 133 of 1993 (*supra*) on the grounds that the section, properly interpreted, did in fact not create a reverse onus and could not, therefore, compromise the presumption of innocence of an accused person. The matter was accordingly referred back to the court *a quo* to be dealt with in accordance with the Constitutional Court's judgment. To my mind, the real value of the court's judgment lies in the explicit acknowledgement of the role that the state must play in protecting women from violence and the acceptance of the radical feminist contention that violence against women is not a "private" matter, but one which spills over into the "public" sphere.

and freedom. When conceptualised as a patriarchal practice and analysed within the context of section 12(1)(c), (d) and (e) as well as section 12(2)(b) of the South African Constitution, violent pornography could thus well be said to constitute a real threat to women's right to freedom and security of the person and their right to bodily and psychological integrity. On this basis the restriction of pornography which depicts the abuse, torture, rape and maiming of women is therefore constitutionally justified.

I shall now turn to the final part of my assessment of the possible constitutional implications of adult heterosexual pornography. To this end, I shall explore the *alternative* constitutional argument which I intend to utilize against adult heterosexual pornography as being a mode of expression which advocates gender hatred.

66 THE ALTERNATIVE CONSTITUTIONAL ARGUMENT: ADULT HETEROSEXUAL PORNOGRAPHY AS THE ADVOCACY OF HATRED BASED ON GENDER THAT CONSTITUTES INCITEMENT TO CAUSE HARM

Section 16 of the South African Constitution entrenches the right to freedom of expression. In recognition of the fundamental (or constitutional) importance of this freedom, section 16(1), *inter alia*, protects freedom of the press, information, artistic creativity and academic activities. The scope of section 16(1) is, however, circumscribed by section 16(2) which expressly prohibits three specifically listed categories of expression. Section 16 reads:

"Freedom of expression

16(1) Everyone has the right to freedom of expression, which includes -

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research.

16(2) The right in subsection (1) does not extend to -

- (a) propaganda for war;
- (b) incitement of imminent violence;
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

It is not my view that all adult heterosexual pornography potentially falls foul of the explicit prohibition of hate speech contained in section 16(2)(c) of the South African Constitution. Accordingly, my assessment in the present instance will be restricted to a particular category of sexually explicit material only. To this end, adult heterosexual pornography which could be conceptualised as a mode of expression which carries a message of gender-specific degradation, humiliation and violence in a context which suggests endorsement or approval of such behaviour or acts will be analysed in relation to sections 16(2)(c) and 36 of the South African Constitution.

In what follows, I shall first discuss the structure and requirements of section 16(2), whereafter I shall consider the main components of hate speech in order to examine adult heterosexual pornography in the light of the constitutional prohibition of the advocacy of (gender) hatred. My discussion will conclude with an assessment of whether section 16(2)(c) constitutes a reasonable and justifiable limitation to the right to freedom of expression within the context of section 36 of the South African Constitution.

6 6 1 The Philosophical Justification of Freedom of Expression as Fundamental Constitutional Right

My critical assessment of United States First Amendment obscenity jurisprudence and case law in Chapter 3 of this dissertation²⁴⁴ revealed that freedom of expression is typically valued on the premise that it promotes the discovery of the truth, the individual quest for autonomy and self-fulfilment and participation in the democratic process and its structures.²⁴⁵ The South African Constitutional Court has recognised the instrumental function²⁴⁶ of freedom of expression by emphasising that the right to express grievances and to propagate or criticise policies enables peaceful democratic progress and change.²⁴⁷ These arguments justify the constitutional protection of various modes of expression and classical liberalists have hailed free expression as an indispensable condition to every other freedom.²⁴⁸ The Constitutional Court likewise interprets freedom of expression to be closely related to the political rights entrenched under the

²⁴⁴ See Chapter 3 of this dissertation par 3 4, especially par 3 4 1 - 3 4 4 and accompanying footnotes (*supra*).

²⁴⁵ For a useful discussion of the philosophical underpinnings and justifications of freedom of expression, see, in general, Johan van der Westhuizen "Freedom of Expression" in D van Wyk et al *Rights and Constitutionalism* 264 at 267 - 270 (*supra*) and J de Waal et al "Expression" in *Handbook* 281 at 282 (*supra*).

²⁴⁶ On the significance of this in regard to adult heterosexual pornography, see Chapter 3 of this dissertation par 3 4, especially par 3 4 1 - 3 4 3 and accompanying footnotes (*supra*).

²⁴⁷ See *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC) par 7 where the court observed that "[f]reedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for the truth by individuals and society generally." For a Southern African perspective on the importance of freedom of expression as constitutional value, see *Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS) at 1554 and *Banana v Attorney-General* 1999 (1) BCLR 27 (ZS) at 31.

²⁴⁸ See Ursula Owen "Hate Speech and Pornography" in J Duncan (ed) *Between Speech and Silence: Pornography, Hate Speech and the New South Africa* (1996) 31 at 35 - 37.

Bill of Rights in the South African Constitution.²⁴⁹

Freedom of expression is not, however, absolute and no constitutional democracy has afforded it unlimited protection.²⁵⁰ Yet even in the heyday of apartheid, a former Chief Justice of South Africa cautioned that free expression must never be limited more than is "absolutely necessary".²⁵¹ Various approaches to facilitate a limitation of freedom of expression are employed in contemporary legal systems. To this end, the right to freedom of expression can be limited through the balancing of conflicting (constitutional) interests (traditionally those of the state against those of the individual) or through the application of a general limitation clause in a justiciable bill of rights which restricts the broad and abstractly defined rights it entrenches. The latter could include the balancing of freedom of expression against other rights, such as equality, human dignity, religion or freedom and security of the person. Three further approaches to facilitate the restriction of freedom of expression have been adopted in the South African Constitution. Over and above a general limitation clause, the right to freedom of expression is demarcated by way of a specific (internal) limitation that is contained in the section entrenching the right itself and free expression may furthermore be limited in terms of other constitutional clauses (not necessarily all of which are in the Bill of Rights) such as section 165(3) which prohibits interference with the functioning of the courts. In the latter instance the *sub iudice* rule is thus entrenched as a form of contempt of court.

Section 16 of the South African Constitution can be seen both as an attempt to address a part of this country's history when free and open political debate was not tolerated and to give content

²⁴⁹ See, in particular, the observations of O'Regan J in *South African National Defence Force Union v Minister of Defence* par 8 (*supra*).

²⁵⁰ As my discussion in Chapter 3 of this dissertation has revealed, even the Supreme Court of the United States is prepared to exclude certain forms of expression from First Amendment protection, the most notable of which is what the court refers to as "obscenity" and "fighting words". For more on the latter, see also par 6 6 2 and accompanying footnotes (*infra*).

²⁵¹ See the *dictum* of Rumpff JA in *Publications Control Board v William Heinemann Ltd* 1965 (4) SA 137 (A) at 160: "[w]hen a court of law is called upon to decide whether liberty should be repressed - in this case the freedom to publish a story - it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of expression is a hard-won and precious asset, yet easily lost. And in its approach to the law, including any statute by which the court may be bound, it should assume that Parliament, itself a product of political liberty, in every case intends to be repressed only to such extent as it in clear terms declares, and, if it gives a discretion to a court of law, only to such an extent as is absolutely necessary." For a critique of this decision and the Publications and Entertainments Act 26 of 1963, see Chapter 5 of this dissertation par 5 2 3 and accompanying footnotes (*supra*).

to those values that have traditionally been relied on to protect expression, such as the search for the truth, the quest for self-fulfilment and the protection of democracy. However, section 16 also addresses the inequality caused, the injury sustained and the indignity suffered in an era when racial abuse was rife and when it was accepted practice to sling racist and pejorative epithets at politically marginalised people, thereby proclaiming their racial inferiority and denying their dignity and humanity. I shall now proceed to consider the provisions of section 16(2) of the South African Constitution in detail.

6 6 2 Expression Specifically Excluded: The Structure, Contents and Requirements of Section 16(2) of the South African Constitution

Section 16(2) of the South African Constitution demarcates the right to freedom of expression by providing that the right entrenched in section 16(1) “does not extend to propaganda for war”, “incitement to imminent violence” and the “advocacy of violence that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”. The formulation of section 16(2)(a) has been taken from the International Covenant on Civil and Political Rights,²⁵² while the prohibition on incitement to imminent violence has its origins in United States First Amendment jurisprudence.²⁵³ The need to restrict the scope of freedom of expression by preventing the advocacy of racial hatred is recognised in a number of international human rights

²⁵² See article 20(1) of the International Covenant on Civil and Political Rights of 1966 which provides that “[a]ny propaganda for war shall be prohibited by law.” This requires an active prohibition of war propaganda, possibly by making it an offence, rather than - as in the case of section 16(2) of Act 108 of 1996 (*supra*) - the mere exclusion of such expression from the scope of the right to freedom of expression.

²⁵³ Whereas early United States Supreme Court cases, such as *Abrams v United States* 250 US 616 (1919), *Whitney v The State of California* 274 US 357 (1927) and *Dennis v United States* 341 US 494 (1952), laid down a “clear and present danger” test to determine the legitimacy of restrictions on freedom of speech in cases involving threats to the security of the state, the Supreme Court held in *Brandenburg v The State of Ohio* 395 US 444 (1969) at 448 that state laws may not criminalise the advocacy of the use of force or civil disobedience, except where such advocacy “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” See also *Collin v Smith* 439 US 916 (1978) and *The State of Texas v Johnson* 491 US 397 (1989). For a critical discussion of United States law on hate propaganda, see Chapter 3 of this dissertation par 3 4 4 and accompanying footnotes (*supra*).

documents²⁵⁴ as well as in a number of constitutional democracies.²⁵⁵

Section 16(2)(c) contains both abstract and concrete requirements. The offending expression should first carry a message of hatred. This is a value-laden determination of whether the complainant has suffered humiliation and degradation. In its concrete requirement, section 16(2)(c) requires that the offending expression must constitute incitement to cause harm. Both of these elements, namely advocacy of hatred on one of the listed grounds and incitement to cause harm, must therefore be present before a mode of expression can be considered to constitute hate speech. Because the words "advocacy of hatred" are capable of a narrow construction, the constitutional focus is likely to be placed on the interpretation of "incitement to cause harm". The second requirement of section 16(2)(c) therefore directs a court to determine the harm that may result from expression characterised as hate speech. Before I proceed to consider whether a particular category of adult heterosexual pornography constitutes the advocacy of gender hatred that constitutes incitement to cause harm, it will be useful to first provide a working definition of hate speech.

6 6 3 Conceptualising the Advocacy of Hatred

By its very nature, hate speech is more than a remark that co-incidentally offends the targeted person or group. Hate speech consists of words that are calculated to dehumanise, degrade and subjugate.²⁵⁶ It chooses its target carefully and carries a distinctive message of inferiority, subordination and degradation. It attacks that which humans value most - our identity, self-worth and inherent dignity. It often targets that which is immutable, such as our race, gender or sexual orientation. The effect of hate speech is that it perpetuates negative stereotypes and promotes discrimination, thereby maintaining the inferior status of the targeted group and hampering their

²⁵⁴ See, for example, article 20(2) of the International Convention on Civil and Political Rights (*supra*) which states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" and also article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (*supra*).

²⁵⁵ See, for example, section 319 of the Canadian Criminal Code which provides that any person "who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of an indictable offence" and article 5 of the Basic Law For The Federal Republic of Germany which provides that the right to freedom of expression is "subject to limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizen's right to personal respect."

²⁵⁶ See, in general, L Lederer and Delgado (eds) *The Price We Pay - The Case Against Racist Speech, Hate Propaganda and Pornography* (1995) 6 (hereinafter referred to as *The Price We Pay*).

participation in society.²⁵⁷ Hate speech could furthermore carry the threat of physical violence or manifest as physical abuse in the form of assault, lynching or rape. Hate speech silences its victim(s).

The advocacy of hatred encompasses an additional dimension when directed towards historically marginalised groups. Under these circumstances hate speech is particularly effective, for it emanates from a socially constructed position of power and thus forms part of a history of domination and a context of disempowerment and injury. According to Mari Matsuda, hate speech has three identifiable characteristics.²⁵⁸ First, it conveys a message of inferiority, secondly, it is directed against a historically oppressed group and finally, its message is persecutory, hateful and degrading. The constituent features of hate speech were conceptualised by the Supreme Court of Canada in *Regina v Keegstra*.²⁵⁹ My discussion of the Supreme Court's decision in Chapter 4 of this dissertation²⁶⁰ revealed that the court conceptualised the harm that may result from hate speech in relation to its psychological and social consequences. Although found to constitute a limitation to freedom of expression, the court upheld section 319(2) of the Canadian Criminal Code²⁶¹ as a reasonable and justifiable limitation in the interest of equality and the cultural diversity of Canadians, both of which find express recognition in the Canadian Charter of Rights and Freedoms.²⁶²

I shall now proceed to consider adult heterosexual pornography in light of section 16(2)(c) of the South African Constitution.

²⁵⁷ See L Lederer and Delgado (eds) *The Price We Pay* at 5 (*supra*). For a discussion of the distinction between the injury experienced from racial insult and that of one based on other distinctive features or attributes, see Neisser "Hate Speech in the New South Africa" 1994 *SAJHR* 336.

²⁵⁸ See "Public Response to Racist Speech: Considering the Victim's Story" in M Matsuda et al *Words that Wound* (1993) 36 at 47 - 71.

²⁵⁹ [1990] 3 SCR 697.

²⁶⁰ See Chapter 4 of this dissertation par 4 4, especially par 4 4 1 - 4 4 6 and accompanying footnotes (*supra*).

²⁶¹ Criminal Code RSC C-46 of 1985. See also par 6 6 2 n 255 (*supra*).

²⁶² See sections 15 and 27 respectively of the Canadian Charter of Rights and Freedoms (Constitution Act of 1982, Part I). Section 27 expressly stipulates that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians."

664 Adult Heterosexual Pornography as the Advocacy of Hatred that Constitutes Incitement to Cause Harm

It may prove unwise to restrict the concept of harm in relation to section 16(2) of the South African Constitution to physical violence, for such an interpretation may well run the risk of collapsing the hate speech provision into the incitement to imminent violence provision.²⁶³ The question arises, however, whether the broad conception of harm employed by the Canadian Supreme Court in *Regina v Keegstra*²⁶⁴ would correspond with the purpose of the exception enunciated in section 16(2)(c) of the South African Constitution. Two considerations weigh against such an interpretation. The first is that, since the categories listed in section 16(2) of the South African Constitution constitute exceptions to the right to freedom of expression conferred in section 16(1), these restrictions should be narrowly interpreted.²⁶⁵ The second is that the word "incitement" is capable of a construction which requires encouragement or indoctrination to cause harm. If so interpreted, the question would be whether a speaker urges an audience to practice what is advocated and whether listeners are likely to respond in the form of physical or emotional harm to the target group.

To my mind, a broader conception of harm corresponds better to the purpose of section 16(2)(c) for the simple reason that hate speech causes the very harm articulated by the Canadian Supreme Court. By accentuating the broad psychological harmful effects of hate speech on members of the target group in question, the Supreme Court brings to light the types of harm caused by this particular mode of expression. It follows that the speech itself - and not the audience who may act on the message it conveys - causes the social and psychological harm against which section 16(2)(c) of the South African Constitution is directed. For purposes of this subsection, the word "incitement" must therefore be taken to mean "directed at" or "intended". Consequently, all that is required is the *advocacy* of hatred on grounds of race, ethnicity, gender or religion, directed at or intended to cause the type of psychological (and social) harm identified by the Canadian Supreme Court.

To my mind, adult heterosexual pornography which conveys a message of gender-specific inferiority and conceptualises women as servile, degrading and dehumanised, correspond with the very characteristics of hate propaganda. As Sopinka J of the Supreme Court of Canada

²⁶³ For the full text of section 16 of Act 108 of 1996 (*supra*), see par 6 6 (*supra*).

²⁶⁴ [1990] 3 SCR 697.

²⁶⁵ But compare Chapter 1 of this dissertation par 1 3, especially par 1 3 1 3 and accompanying footnotes (*supra*) for examples of instances where the South African Constitutional Court opted for a generous interpretation of the rights entrenched under the Bill of Rights in Act 108 of 1996 (*supra*).

correctly noted in *Regina v Butler*,²⁶⁶

“[t]he message of [pornography] which degrades and dehumanizes is analogous to that of hate propaganda ... [pornography] wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentation.”²⁶⁷

By accentuating the degradation and dehumanisation of women in pornography, it could thus well be argued that adult heterosexual pornography constitutes hate speech within the meaning of section 16(2)(c) of the South African Constitution. It injures the women who appear in pornography, those who are sexually abused because of its consumption and those who are hurt by the inequality it engenders.²⁶⁸

Once it has been established that pornography could be construed as hate speech, the question whether pornography constitutes incitement to cause harm must be assessed. As indicated above, section 16(2) requires that the offending expression should first of all carry a message of hatred whereafter it must be established whether the expression causes harm. If the broad conception of harm employed by the Canadian Supreme Court is applied, it follows that it must be determined whether pornography which carries a message of gender inferiority, dehumanisation and degradation causes psychological or emotional harm to women as a group. As MacKinnon so eloquently states,

“[hate speech] promotes the disadvantage of unequal groups; ... [the] stereotyping and stigmatization of historically disadvantaged groups through group hate propaganda shape their social image and reputation, which controls their access to opportunities more powerfully than their individual abilities do ... it is impossible for an individual to receive equality of opportunity when surrounded by an atmosphere of group hate.”²⁶⁹

It need not, to my mind, be argued that a response of humiliation and degradation (even anger) is to be expected from groups targeted by racist or sexist hate propaganda. South Africa's history of institutionalised oppression indeed bears out this argument. Like racist hate speech, images which purport to convey the sexual inferiority and degradation of women engender severe psychological consequences. And these are consequences that a nation and constitutional order that prides itself on non-racism, non-sexism and the fostering of human dignity through, among other things, an acknowledgement of equality between the sexes, cannot tolerate.

²⁶⁶ [1992] 1 SCR 452. For an extensive discussion of this decision, see Chapter 4 of this dissertation par 4.3 and accompanying footnotes (*supra*).

²⁶⁷ [1992] 1 SCR 452 at 501.

²⁶⁸ See Stoltenberg “The Triangular Politics of Pornography” in L. Lederer and Delgado (eds) *The Price We Pay* 176 at 177 (*supra*).

²⁶⁹ See “Equality and Speech” in *Only Words* 71 at 99 (*supra*).

The requirement that the offensive expression must constitute incitement to cause harm appears to be a lesser requirement than one which calls for the establishment of a direct causal link between pornography and acts of (sexual) violence against women. It would not, therefore, appear to be an instance where the speech in question must result in a particular violent incident, but rather that pornography as hate speech encourages gender-specific anti-social behaviour against women as a group. The concrete requirement of section 16(2)(c) of the South African Constitution does not, to my mind, appear to insist on direct (factual) cause and effect, but would appear to be satisfied when the speech or mode of expression is situated, as my second proposed definition of pornography indicates,²⁷⁰ in a context which suggests endorsement or approval of sexually explicit gender-specific acts of degradation, humiliation or violence.

Once it has been established that a particular category of pornographic material could be construed as the advocacy of hatred that constitutes incitement to cause harm, the question arises whether section 16(2)(c) needs to be justified in light of the general limitation clause of the South African Constitution.²⁷¹ This question will be considered next.

6 6 5 The Relationship between Section 16(2) and Section 36 of the South African Constitution

Section 16(2)(c) of the South African Constitution sends out a clear message that abusive speech which targets groups on the basis of race, gender, ethnicity and religion, can never be protected in a legal and constitutional order that is based on fundamental democratic values such as equality, human dignity and freedom. In response, Parliament has enacted the Films and Publications Act²⁷² to help sustain this constitutional provision. To this end, section 29 of the Films and Publications Act - together with Schedules 1 and 6 thereof²⁷³ - expressly prohibits the distribution of a publication, the public exhibition of a film or any public entertainment which - when judged within context - amounts to propaganda for war, incites to imminent violence or advocates hatred that is based on race, ethnicity, gender or religion and which constitutes

²⁷⁰ See Chapter 5 of this dissertation par 5 5, especially par 5 5 2 and accompanying footnotes (*supra*).

²⁷¹ For the full text of section 36 of Act 108 of 1996 (*supra*), see par 6 4 2 2 (*supra*).

²⁷² Act 65 of 1996 (*supra*).

²⁷³ Schedule 1(1)(d) - (e) and Schedule 6(1)(d) - (e) of Act 65 of 1996 (*supra*) both expressly prohibit "explicit sexual conduct which degrades a person and which constitutes incitement to cause harm" as well as "the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm."

incitement to cause harm.²⁷⁴

It does not, however, appear necessary to justify the provisions of section 16(2) in terms of the general limitation clause contained in section 36 of the South African Constitution. Section 36(1) requires that the rights in the Bill of Rights may be limited only in terms of law of general application²⁷⁵ to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This means that rights may be infringed, but only when the infringement is for a compellingly good reason,²⁷⁶ such as that it serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy.²⁷⁷ Section 16(2) of the South African Constitution, however, is a so-called "internal

²⁷⁴ With the exception of *bona fide* scientific, documentary, dramatic, artistic, literary or religious publications, films or public entertainment, or a publication, film or public entertainment which amounts to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience: see section 29(4)(a) - (c) of Act 65 of 1996 (*supra*).

²⁷⁵ In terms of section 36(1) of Act 108 of 1996 (*supra*), only a "law of general application" can validly limit a right in the Bill of Rights. This minimum requirement for the limitation of a right is the expression of a basic principle of liberal political philosophy and in step with the rule of law: see, in general "Limitation" in J de Waal et al *Handbook* 132 at 135 (*supra*) and Gerhard Erasmus "Limitation and Suspension" in D van Wyk et al *Rights and Constitutionalism* at 629 (*supra*).

²⁷⁶ The requirement of proportionality signifies that the infringement must not be disproportionate to the benefits that it seeks to obtain. In other words, where a law does unnecessary damage to fundamental rights, the damage could well have been avoided or minimised by the use of other means to achieve the same purpose. A value judgment must accordingly be made. To satisfy the limitation test then, it must be shown that the law or limitation in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the infringement and the benefits or purpose it is designed to achieve. The Constitutional Court's pronouncement on the application of section 33 of the Interim Constitution in *S v Makwanyane* at 708 (*supra*) has become a standard reference when a court must consider the legitimacy of a limitation. The standard of the Constitutional Court has been summarised as follows in *S v Bhulwana* 1996 (1) SA 338 (CC) par 18: "[i]n sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."

²⁷⁷ See Meyerson who argues that "the reasons supplied by the state for limiting a constitutionally protected right have to be such as to elicit the agreement of all reasonable citizens who matter equally ... it may not appeal to a justification whose normative force depends on an intractably disputed point of view or way of reasoning" in *Rights Limited* (1997) 17. Some support for this argument is to be found in the Constitutional Court's approach to justifications of restrictions on homosexuality and gay practices in *National Coalition for*

modifier", in other words, it is a (constitutional) provision equal in status to the (general) limitation clause.²⁷⁸ And since the latter is only applicable to non-constitutional "law of general application" which limits rights entrenched in the Bill of Rights, section 16(2) does not have to be justified in terms of section 36. Section 16(2) forms part of the definition of freedom of expression that is entrenched under section 16(1) of the South African Constitution. Section 16(2) therefore justifies its own existence and, once "the advocacy of hatred" has been suitably conceptualised, the right protected in section 16(1) *per definition* becomes a right to freedom of expression *precluding* hate speech. Therefore, once it has been established that a particular category of pornographic material could be construed as the advocacy of (gender) hatred that constitutes incitement to cause harm, the (constitutional) examination is concluded. An assessment of section 16(2)(c) in terms of the general limitation clause of the South African Constitution is for that reason not necessary.

67 CONCLUDING OBSERVATIONS

My assessment of adult heterosexual pornography in relation to the rights entrenched in sections 9, 10, 12 and 16 of the South African Constitution has shown that pornography has a direct impact on certain fundamental rights and freedoms of women. A (radical feminist) conception of pornography as an ubiquitous (patriarchal) practice is therefore well suited to an assessment in terms of sections 9, 10 and 12 of the South African Constitution. Such a conception highlights the differentiation that is inherent in adult heterosexual pornography and once the sexual objectification of women is accentuated, the fact that pornography stands absolutely central in creating and maintaining sex as basis for discrimination is revealed. Since these conditions necessitate an assessment of the actual social conditions of women, they stand in recognition of the fact that women are members of a (previously) disadvantaged and marginalised group. This, in turn, brings to light the politics of (gender/sex) discrimination in that both the nature of the power in terms of which discrimination is actualised in the patriarchal state and the purpose sought to be achieved by it, is revealed. Within the context of our supreme Constitution and justiciable Bill of Rights the various social evils both produced and entrenched by apartheid, notably gender-specific violence, marginalisation and subordination, are unmasked and can consequently be addressed within the framework of section 9 of the South African Constitution.

By accentuating adult heterosexual pornography as an affront to women's dignity as human

Gay & Lesbian Equality v Minister of Justice par 37 - 38 (*supra*). The court's rejection of moralistic or religious-based justifications for these restrictions is arguably motivated by their intractably disputed or controversial nature.

²⁷⁸ See, in general, "The Structure of the Bill of Rights" in I Currie and J de Waal (eds) *The New Constitutional and Administrative Law* (2000) at 342 - 344 and J de Waal et al *Handbook* 132 at 151 - 153 (*supra*).

beings, a section 12 analysis reveals the acute abuse, torture and maiming of women in pornography. Once these conditions are exposed, pornography manifests itself as a real threat to women's right to be free from all forms of violence (irrespective of whether from public or private sources), not to be tortured, not to be treated in a cruel, inhuman or degrading manner and the right to security in and control over their bodies. Since violence is the product of social conditioning, the reported reasons for conflict in South Africa - to my mind - indeed confirm an association or correlation between violence against women and patriarchal conceptions of gender and sex roles.

Even when analysed within the "traditional" free speech paradigm, a limited category of adult heterosexual pornography (as was shown) falls foul of the specific constitutional prohibition of the advocacy of gender hatred and incitement to cause harm. I have shown that since adult heterosexual pornography corresponds with a conception of hate speech which requires a persecutory, hateful and degrading message of inferiority directed against a historically oppressed group, it violates section 16(2)(c) of the South African Constitution. Hate speech thus extends beyond physical violence and its harm lies in its psychological and social consequences, or in the words of Sopinka J of the Supreme Court of Canada, in its "power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentation."

Once it has been established that adult heterosexual pornography - conceptualised either as a universal patriarchal practice of subordination or as a hateful mode of expression - violates specific rights and freedoms entrenched under the Bill of Rights in the South African Constitution, the question whether pornography justifies regulation needs to be addressed. This question, together with the specific conclusions reached and recommendations advanced over the course of six chapters, will next be considered in the final chapter of this dissertation.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

| | PAGE |
|---|-------------|
| 7 1 INTRODUCTION | 323 |
| 7 2 PORNOGRAPHY IN SOUTH AFRICA'S AGE OF CONSTITUTIONALISM | 324 |
| 7 2 1 The Foundational Requirement: A Suitable Theoretical Framework | 324 |
| 7 2 2 The American Experience: An Obsession with Speech, Prurience and Mere Images | 329 |
| 7 2 3 The Canadian Alternative | 336 |
| 7 2 4 A Suitable Conception of Harm and Legal Definition of Adult Heterosexual Pornography for South African Law | 339 |
| 7 2 5 Pornography and the South African Constitution: A Violation of Equality, Human Dignity and Physical Integrity? | 347 |
| 7 3 SOME THOUGHTS ON THE REGULATION AND/OR PROHIBITION OF ADULT HETEROSEXUAL PORNOGRAPHY AS LEGAL AND POLITICAL STRATEGY | 355 |
| 7 4 CONCLUDING OBSERVATIONS | 361 |

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

"What do you want to be when you grow up? *Doggie Girl?* *Gestapo Sex Slave?* *Black Bitch in Bondage?* Pet, bunny beaver?"¹

"At rock-bottom there are two rational attitudes towards censorship. The one, associated with great names such as Plato, St Augustine, Hegel, Bergson and Spinoza, holds that man is unfree when acting under the influence of known erroneous ideas, and that censorship to end this preserves human virtues, cultural values and democratic ideals. The other, associated with names such as Aristotle, Locke, Bentham and John Stuart Mill, goes to a great extent, if not always entirely, in favour of the view that freedom lies in open choice, and that true values cannot be attained through repression."²

"In a society where gender inequality and sexual violence exist as entrenched and widespread social problems, it makes sense that criminal legislation with the objective of prohibiting material that attempts to make degradation, humiliation, victimization, and violence against women appear normal and acceptable is constitutionally valid."³

7.1 INTRODUCTION

My endeavour to assess adult heterosexual pornography within the framework of a constitutional democracy, sustained by a supreme constitution and justiciable bill of rights, posed a number of challenges of which not the least was the establishment of a suitable theoretical framework with the potential to facilitate a gender-specific analysis of pornography. This necessitated a critical evaluation of traditional (male biased) conceptions of equality, individual autonomy and state neutrality which have become entrenched in - and thus characterise - Anglo-American legal and political thinking. In this final chapter, I shall attempt to set out the various conclusions I have reached in - and the accompanying recommendations which result from - my evaluation of adult heterosexual pornography over the course of six chapters as well as my thoughts on censorship as appropriate means to further women's constitutional interests in equality, dignity and physical integrity.

¹ Andrea Dworkin "Against the Male Flood: Censorship, Pornography, and Equality" in P Smith (ed) *Feminist Jurisprudence* (1993) 449 at 455. See also 1985 8 *Harvard Women's Law Journal* 1 at 11 and C Itzin (ed) *Pornography: Women, Violence and Civil Liberties* (1992) 515 at 523 (hereinafter referred to as *Pornography*).

² Ellison Kahn "When the Lion Feeds - and the censor pounces: A disquisition on the banning of immoral publications in South Africa" 1966 *SALJ* 278 at 279.

³ Katherine Mahoney "Canadian Approaches to Equality Rights and Gender Equity in the Courts" in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) at 448.

7.2 PORNOGRAPHY IN SOUTH AFRICA'S AGE OF CONSTITUTIONALISM

7.2.1 The Foundational Requirement: A Suitable Theoretical Framework

The challenge to establish a suitable theoretical framework to guide an assessment of adult heterosexual pornography, coupled with the need to evaluate the interrelationship between gender, agency and sexuality within the context of women's constitutional interests in equality, dignity and physical integrity, points towards feminism. To my mind, compelling reasons exist to assume a feminist stance on adult heterosexual pornography, for only a feminist analysis of pornography has the potential to draw into the debate the importance of fundamental rights, the superficiality of equality rhetoric (and its hidden consequences), the construction of sexuality (and gender), the significance of (social) representation and the legitimacy of state power in relation to censorship and/or regulation. And since the feminist movements in Northern America, Europe and Australasia have provided valuable (legal) insights into the situation of women by conceptualising patriarchal power and pornography as, *inter alia*, threats to gender equality, only feminism has the potential to facilitate a critical analysis of the law and pornography as patriarchal constructs.

My evaluation of the philosophical foundation and core theoretical premises of liberal feminism⁴ revealed that liberal feminism proceeds from the assumption that women - as individual rational beings - are entitled to the equal enjoyment of basic liberties and rights.⁵ Since liberal feminism is grounded in the traditional liberal view of human beings as autonomous rational agents, it presupposes that physical characteristics such as race and sex are of little consequence to political theory. By virtue of the fact that liberal feminism emphasises rationality and not physicality, it accepts the idea of creating a society which maximises individual autonomy, formal equality and equal opportunity for individual self-fulfilment. As a consequence, liberal feminism's understanding of the role of the state as a neutral entity,⁶ its abstract conception of human nature⁷

⁴ See Chapter 2 of this dissertation par 2.3 and accompanying footnotes (*supra*).

⁵ See Chapter 2 of this dissertation par 2.3.1 and accompanying footnotes (*supra*).

⁶ See Chapter 2 of this dissertation par 2.3.2, especially par 2.3.2.1 and accompanying footnotes (*supra*).

⁷ See Chapter 2 of this dissertation par 2.3.2, especially par 2.3.2.2 and accompanying footnotes (*supra*).

and human reason⁸ and its formal view of equality,⁹ coupled with a strict demarcation between the private and public realm,¹⁰ poses a number of distinct challenges for an analysis of adult heterosexual pornography which proceeds from the social reality and experiences of women under a patriarchal social, legal and political order. Although I must concede that no political theory which seeks to address the situation of women can be satisfactory in all aspects, liberal feminism's incomplete and biased view of human nature and its failure to address society's power relations in both the private and public sphere renders it unable to predict political and/or legal outcomes or to provide a workable strategy for women's liberation. A feminist theory which centralises gender, sex and sexuality (instead of underplaying them) within a social context of male domination will not only be better suited to facilitate legal and doctrinal reform, but be capable also of facilitating a comprehensive (constitutional) critique of adult heterosexual pornography.

In spite of these specific challenges, I am of the view that a liberal conception of women's oppression is not, however, completely wanting as suitable framework within which to assess some of the constitutional implications of adult heterosexual pornography.¹¹ This is, however, the direct consequence of a unique feature of the South African Constitution which could facilitate a specific argument against adult heterosexual pornography, conceptualised as a mode of expression, within the ambit of the larger liberal paradigm. I refer here to the express prohibition of so-called hate speech contained in section 16(2)(c) of the South African Constitution which could facilitate an argument against a limited category of pornographic material, provided that it can be shown that this type of material constitutes the advocacy of gender hatred and incitement to cause harm. An argument against adult heterosexual pornography within the ambit of section 16(2)(c) of the South African Constitution is well suited as an alternative to a more comprehensive constitutional critique of pornography couched within a radical feminist framework.

By contrast, radical feminism - as a political theory - does not assimilate women's needs and experiences into a pre-existing theory, but seeks to give an account of the social reality of women

⁸ See Chapter 2 of this dissertation par 2 3 2, especially par 2 3 2 3 and accompanying footnotes (*supra*).

⁹ See Chapter 2 of this dissertation par 2 3 2, especially par 2 3 2 4 and accompanying footnotes (*supra*).

¹⁰ See Chapter 2 of this dissertation par 2 3 2, especially par 2 3 2 5 and accompanying footnotes (*supra*).

¹¹ See Chapter 2 of this dissertation par 2 3 3 and accompanying footnotes (*supra*).

under a pervasive system of male domination instead.¹² This unique feature of radical feminism has produced profound insights into women's oppression of which the most fundamental is that distinctions of gender, based on sex, structure virtually every aspect of our lives. Since these distinctions constitute an all-pervasive and unchallenged feature of our social reality, radical feminism employs gender to construct a comprehensive critique of women's oppression. Consequently, radical feminism conceives of gender as both the way in which women are socially differentiated from and subordinated to men, with the result that the problem of women's oppression is seen to be situated in both gender and sex which are thought of as dialectically and inseparably interrelated.

The radical feminist conception of women's oppression is not, however, itself without problems. The radical feminist theory of patriarchy could, for example, be challenged on the basis that it is descriptive rather than analytical, that it is based on a false universalism and that it conceptualises women as passive victims of sexual oppression.¹³ To my mind, the critique that the radical feminist theory of patriarchy is descriptive rather than analytical must be understood in light of the larger object of radical feminist thinking. The objectives of a sophisticated theory based on women's own experiences and reality of oppression and sexual domination should indeed be to identify and understand the structures and institutions that maintain patriarchal dominance with a view to facilitate substantive change. A search for the origins of male domination is therefore not only misplaced, but bound also to be unsuccessful for the simple reason that women's subordination is not a single phenomenon. A search for origins could, to my mind, also run the risk of obfuscating the reality (and often extreme consequences) of male power.

With regard to the claim that radical feminism is based on a false universalism, I support - in principle - the argument that it is important to guard against cultural imperialism where concerns of middle-class Western women are equated with the experiences of all women. The idea of a common women's experience seems to emanate from an attempt to discover what it is about human biology that enables men to dominate women. And because radical feminism attempts to answer this question without reference to any historical context, radical feminism seems to imply that human biology is an unchanging and pre-fixed social given. With a view to address these concerns, I think one must understand that the acknowledgement that women's subordination is not a single (unchanging) phenomenon does not, in fact, constitute a denial of the radical feminist claim that men dominate women universally. It does mean, though, that men do so through a variety of social structures that vary both across (and sometimes even within)

¹² See Chapter 2 of this dissertation par 2 4 and accompanying footnotes (*supra*).

¹³ See Chapter 2 of this dissertation par 2 4, especially par 2 4 1 and accompanying footnotes (*supra*).

cultures. The universality of male dominance is not, therefore, brought into question by the argument that the structures of patriarchy are interrelated or by the acknowledgement that men - as well as women - have varying degrees of power, either individually or as a group.

The challenge that the radical feminist theory of patriarchy conceptualises women as passive victims of sexual oppression seems premised on an understanding of patriarchy as an unchanging "web of oppression".¹⁴ However, to my mind, the idea that society is structured by male domination needs not in itself preclude the possibility of change. In fact, since the focal point of radical feminism is to make patriarchy visible and to identify the structures of male power that need to be challenged, radical feminism not only recognises that changes in the nature of patriarchy are possible but actually opens up the possibility for change in the nature of male domination as women's challenges to it become visible. Therefore, the recognition of the existence of patriarchy as the source of the most fundamental inequality does not, in fact, exclude the possibility of resistance, nor does it have to be construed as involving a denial of other forms of oppression emerging from cultural, race or class contexts.

Unlike most conventional political theories, radical feminism does not view state power as the central political issue that confronts women.¹⁵ The state is viewed as but one manifestation of patriarchal power, thought to merely reflect other deeper structures of oppression. However, the idea that sexuality is not simply an individual matter but one that is bound up with power structures in society is not exclusive to radical feminism. Radical feminism views sexuality as the product of a world in which men have authority and male needs and desires set the agenda in all spheres.¹⁶ Sexual behaviour is therefore conditioned by a man-made culture characterised by free access to pornography, tolerance of sexual violence, the treatment of women as sex objects and the existence of different moral codes for men and women. Accordingly, since equality is constituted in society and history, sexual behaviour becomes bound up in radical feminist thinking with the idea of ownership, domination and submission. For radical feminism, sexuality is inextricably linked to patriarchal violence, because patriarchy - like all other systems of power - is understood to ultimately rest on force. The idea that patriarchal violence may be institutionalised in the law, but also finds direct expression in and frequently takes the form of sexual violence, particularly rape, has led radical feminists to argue that sexual abuse and rape

¹⁴ This term is employed by Denise Réaume in her critical assessment of radical feminist thought: see "The Social Construction of Women and the Possibility of Change: Unmodified Feminism Revisited" 1992 5(1) *Canadian Journal of Women and the Law* 463 at 480.

¹⁵ See Chapter 2 of this dissertation par 2 4 2, especially par 2 4 2 1 and accompanying footnotes (*supra*).

¹⁶ See Chapter 2 of this dissertation par 2 4 2, especially par 2 4 2 2 and accompanying footnotes (*supra*).

are part of a whole culture in which the threat of sexual violence dominates women's lives. Andrea Dworkin and Catharine MacKinnon have been instrumental in forging an understanding of the interrelationship between women's sexuality and pornography.¹⁷ Both these scholars conceptualise sexuality as a construct of gender inequality which is given meaning by, through and in pornography. Radical feminism does not, therefore, conceive of pornography as harmless fantasy or mere sexually explicit images or portrayals, but views pornography as a vehicle through which gender inequality becomes sexual instead. This explains why radical feminists regard pornography as a central practice in the sexually based subordination of women and why radical feminist arguments against pornography are not on the whole directed against sexual explicitness as such. Instead, the focal point is on the association of sexual explicitness with violence and the depiction of women as passive, sexually available objects.

To my mind the value of radical feminism as theoretical framework is to be found in its unique conception of pornography and sexuality which shows how sexuality - and more specifically female identity - is constructed through a gender hierarchy in which women are subordinated and subjected.¹⁸ By recognising the constitutive role of sexuality in the creation and perpetuation of male dominance, radical feminism provides the conceptual foundation to bring sexuality into the domain of politics. Radical feminism thus enlarges the domain of politics to make visible previously concealed forms of oppression. Although only a framework which conceptualises pornography as a constitutional (in other words a legal) problem which affects the fundamental rights and freedoms of women has the potential to facilitate meaningful doctrinal change, this does not imply that I find the whole of the radical feminist account of women's oppression valuable. In addition to the difficulties which I have raised in respect of the radical feminist theory of patriarchy, I also find the extreme conception of heterosexual sex as manifestation of male hatred and contempt for women problematic. By simply discarding the possibility of male support for campaigns directed at ending women's subordination or even the possibility of changes in male behaviour (and in the nature of patriarchy itself), one will indeed be hard pressed to create a climate that is conducive to changing the gender organization of society if one negates the possibility of male co-operation and support. One need not subscribe to a view of heterosexual sex as the manifestation of male hatred as a precondition to an understanding of pornography, sexuality and violence against women as expressions of patriarchal power that can be challenged within the ambit of a supreme constitution with a justiciable bill of rights. Radical feminist thought can constitute a particularly useful framework within which to cast a

¹⁷ See Chapter 2 of this dissertation par 2 4 2, especially par 2 4 2 3 and accompanying footnotes (*supra*).

¹⁸ See Chapter 2 of this dissertation par 2 4 3 and accompanying footnotes (*supra*).

comprehensive constitutional argument¹⁹ against adult heterosexual pornography within the ambit of the right to equality, the right to human dignity and the right to freedom and security of the person which are entrenched in sections 9, 10 and 12 of the South African Constitution respectively. Since radical feminism has the potential to reveal the power relations at play and seeks to understand the nature of patriarchy, it draws pornography into the realm of politics. Moreover, a radical feminist critique also accentuates the (sexual) objectification that stands central to all adult heterosexual pornography. By identifying objectification as the basis of differentiation between men and women in a patriarchal society, radical feminism indeed assists an equality analysis of pornography within the specific juridical framework established by the South African Constitutional Court.²⁰

7 2 2 The American Experience: An Obsession with Speech, Prurience and Harmless Images

My assessment of the obscenity jurisprudence of the Supreme Court of the United States in Chapter 3 of this dissertation revealed that, in spite of the constitutional mould in which the debate is cast, the court adopts a strong moralistic stance on pornography in relation to its interpretation of the rights entrenched in the First Amendment to the United States Constitution.²¹ In the absence of a general limitation clause, the Supreme Court allows for a limitation of rights and freedoms enshrined in the United States Constitution on an *ad hoc* basis, setting precedents restricted both in scope and content. This - in part - accounts for the Supreme Court's conception of sexually explicit material that would enjoy protection under the First Amendment (in other words, material that falls outside the court's standard for obscenity) as opposed to material that would not enjoy similar protection (so-called "obscene" or "hard core pornography").

By employing a libertarian paradigm, the Supreme Court subscribes to an abstract concept of free speech which proceeds from the assumption that all speech is of equal value and thereby surmises that non-obscene pornography has social value, as do esteemed works of art and literature.²² Moreover, the court presumes that all individuals have equal access to the means of expression and dissemination of ideas and thus fails to acknowledge substantive structural inequalities. Yet the structural powerlessness of women is a crucial determinant of the degree

¹⁹ I employed the term "primary" constitutional argument to denote my assessment of adult heterosexual pornography couched within the ambit of radical feminist thought.

²⁰ See also par 7 2 6 (*infra*).

²¹ See Chapter 3 of this dissertation par 3 3 and accompanying footnotes (*supra*).

²² See Chapter 3 of this dissertation par 3 4 and accompanying footnotes (*supra*).

to which women have access to the means of expression. And because women are also silenced through sexual abuse and violence, an abstract system of free speech lacks the substantive means to empower those who have been systematically excluded from public discourse on the basis of race and/or sex. The investigation by the South African Human Rights Commission into racism in the media which highlighted racial stereotyping, marginalisation and prejudice in the still predominantly white owned South African media underscores this point. The South African experience strikingly shows that those groups who did not enjoy fundamental freedoms prior to the adoption of the Interim Constitution in 1994, appear not to have been secured these freedoms to the fullest extent in practice in post-apartheid South Africa either. Consequently, it makes no sense to assume that (previously) marginalised groups will enjoy the same measure of free speech through an abstract system, for an abstract system does not account for the fact that in a hierarchal society, the speech of the (socially and politically) powerful group will inevitably dominate public discourse and thus distort the "free" competition in the marketplace of ideas and that these conditions effectively serve to maintain structural racial and sex inequality.

A closer inspection of the philosophical justification employed by the United States Supreme Court for the constitutional protection afforded to freedom of expression reveals that the court seeks a political justification for the First Amendment that not only corresponds with previous (constitutional) practice, but also provides a compelling reason why freedom of expression is granted such a privileged position among other liberties.²³ Two justifications of the protection of freedom of expression emanates from John Stuart Mill's marketplace of ideas paradigm.²⁴ The first justification considers freedom of speech as important instrumentally; the second views freedom of expression as an essential and constitutive feature of a just (liberal) society. The instrumental justification of free speech is based on the assumption that truth is more likely to be discovered and error eliminated if a free exchange of ideas and open debate is allowed. The constitutive justification, on the other hand, sees this liberty as an essential feature of a society that treats its (adult) members as responsible moral agents. The constitutive justification of free speech - in turn - encompasses two dimensions. The first dimension requires that morally responsible individuals make up their own minds about what is good or bad or true and false in life, politics or matters of justice. But moral responsibility has a second more active dimension as well. Moral responsibility is thought to not only denote the forming of one's own convictions, but also the expression of those convictions to others out of a compelling desire that the truth be known, justice be served and the common good secured. The instrumental and constitutive justifications of freedom of expression are obviously not mutually exclusive and Mill indeed

²³ See Chapter 3 of this dissertation par 3 4, especially par 3 4 1 and accompanying footnotes (*supra*).

²⁴ See Chapter 3 of this dissertation par 3 4, especially par 3 4 2 and accompanying footnotes (*supra*).

conceived of these as interrelated ideas.

My assessment of the obscenity jurisprudence of the United States Supreme Court in the two leading cases of *Roth v United States*²⁵ and *Miller v California*²⁶ revealed, however, that the court only relies upon the instrumental justification of freedom of expression. The Supreme Court thus sees free speech as essential in the quest for the truth and elimination of error in politics. Consequently, the one matter on which the court has agreed in over forty years is that obscenity falls outside the protection afforded to freedom of speech and the press by the First Amendment to the United States Constitution. Since obscenity is thought to have "no redeeming social value"²⁷, to form "no essential part of any exposition of ideas"²⁸ and to "lack serious literary, artistic, political or scientific value"²⁹, only hard core pornography is excluded from First Amendment protection. This places the court's rationale for the protection of "non-obscene pornography" (in other words, soft core pornography) directly at issue. To my mind, the categories employed by the Supreme Court whereby constitutionally protected speech is distinguished from unprotected obscenity seem arbitrary from the very perspective of the instrumental view of free speech that these categories are presumed to reflect. Consequently, the court's obscenity jurisprudence can only be interpreted to the effect that the First Amendment must be understood to protect sexually explicit material on the forced (and easily rebuttable) assumption that citizens need such material in order to effectively participate in the political process. This understanding of the scope and object of the First Amendment facilitates the argument that pornography is essential to, for example, enable citizens to exercise their democratic right to vote and otherwise engage in politics in an informed and intelligent manner. If the intellectual and philosophical premise of the Supreme Court's understanding of obscenity is accepted, the First Amendment could be understood to protect nothing but political speech and the protection afforded to literature, art and science can therefore only be accounted for as a specific derivative from that principal political function.

To my mind, two critical consequences result from the Supreme Court's exclusion of obscenity from First Amendment protection.³⁰ On the one hand, the court has argued itself into a position

²⁵ 354 US 476 (1957).

²⁶ 413 US 15 (1973).

²⁷ See *Memoirs v Attorney General of Massachusetts* 383 US 413 (1966).

²⁸ See *Chaplinsky v New Hampshire* 315 US 568 (1942).

²⁹ In *Miller v California* at 24 (*supra*).

³⁰ See Chapter 3 of this dissertation par 3 4, especially par 3 4 3 and accompanying footnotes (*supra*).

where it can offer neither a constitutional nor philosophical basis on which to reject arguments for the regulation of all sexually explicit material. More particularly, the instrumental goal of a democratic and political order does not contradict the radical feminist argument that women are more effective participants in the political process when their fundamental rights and freedoms are not violated by the production and dissemination of sexually explicit material. The instrumental justification of freedom of expression employed by the Supreme Court actually underscores an argument for the regulation of pornography (albeit pornography conceptualised as a mode of expression). The court would therefore have to agree that legislative measures which conceptualise pornography as a violation of women's fundamental rights and liberties would enhance rather than compromise a democratic order to the degree that these measures seek to restrict speech which decrease women's voice and role in the democratic political process. On the other hand, the United States Supreme Court can also provide no constitutional (or philosophical) justification not to endorse the markedly different approach adopted by the Supreme Court of Canada on the issue of obscenity. By employing an instrumental argument, the Canadian Supreme Court upheld a provision of the Canadian Criminal Code which prohibits certain categories of pornographic material. Although the Supreme Court conceded that the effect of its decision was to narrow the scope of the right to freedom of expression guaranteed in the Canadian Charter of Rights and Freedoms, it maintained the view that sexually explicit material acutely offend the values that are fundamental to Canadian society. The Supreme Court thus found the restrictive effect on free expression justified given the gravity of the harm and the threat to the social and constitutional values at stake. To my mind, the United States Supreme Court's philosophical and intellectual justification for freedom of expression is less than convincing. This problem is exacerbated by the difficulties inherent to the court's three-part test of obscenity.

The Supreme Court's standard of obscenity enunciated in *Miller v California* hinges on whether the average person, applying contemporary community standards would find that the material, taken as a whole, appeals to the prurient interest, whether the material depicts or describes, in a patently offensive way, sexual conduct specifically circumscribed by law and whether the material, taken as a whole lacks serious literary, artistic, political or scientific value.³¹ While the standard of the average person has been shown to be problematic in a gender-specific context, the requirement that the court must apply contemporary community standards would appear to constitute an unattainable standard.³² The requirement that the work must appeal to the prurient interest seems to expect a court to assess whether the material in question is sexually arousing.

³¹ See Chapter 3 of this dissertation par 3 4 4 and accompanying footnotes (*supra*).

³² See Chapter 3 of this dissertation par 3 4 4, especially par 3 4 4 1 and accompanying footnotes (*supra*).

Since prurience implies a moralistic standard, tastes and attitudes are allowed to determine a legal outcome and are thus effectively elevated to a constitutional standard. In a plural society, such as South Africa, the notion of offensiveness can easily be used to target unpopular (or even unpleasant or disagreeable) views or opinions. The questioning of political, cultural or religious beliefs and/or practices can therefore easily be deemed offensive. To define hard core pornography as that which is patently offensive misconstrues its harm.³³ Acts against the good social order, coupled with the interests of unwilling recipients on whom sexually explicit material is thrust and minors, are typically seen to justify a restriction of sexually explicit material, with the result that the possible effect of pornographic depictions of women on the female sector of the community is completely overlooked. The Supreme Court's requirement that the work must lack serious literary, artistic, political or scientific value is equally problematic.³⁴ For example, a sexually explicit, graphic depiction of the President of the United States engaged in fellation in the Oval Office with a White House intern published in the election manifest of the opposition party in the run up to the presidential election may well be found to have political value and would thus not fall foul of the First Amendment.

The anti-pornography ordinances drafted by Andrea Dworkin and Catharine MacKinnon for the City Councils of Minneapolis³⁵ and Indianapolis³⁶ testify to a striking reconceptualisation of the problem of pornography. By conceptualising pornography as subordination, the authors conceive of pornography as an active practice of sex discrimination.³⁷ In itself, pornography is thus seen both as a form of subordination³⁸ and a cause of subordination, and hence sex discrimination.³⁹ The ordinance for the City of Indianapolis was, however, struck down as unconstitutional in a decision of the Federal Appeals Court for the Seventh Circuit in *American Booksellers*

³³ See Chapter 3 of this dissertation par 3 4 4, especially par 3 4 4 2 and accompanying footnotes (*supra*).

³⁴ See Chapter 3 of this dissertation par 3 4 4, especially par 3 4 4 3 and accompanying footnotes (*supra*).

³⁵ See Chapter 3 of this dissertation par 3 5 1, especially par 3 5 1 3 and accompanying footnotes (*supra*).

³⁶ See Chapter 3 of this dissertation par 3 5 1, especially par 3 5 1 4 and accompanying footnotes (*supra*).

³⁷ See Chapter 3 of this dissertation par 3 5 1, especially par 3 5 1 2 2 and accompanying footnotes (*supra*).

³⁸ See Chapter 3 of this dissertation par 3 5 1, especially par 3 5 1 2 1 and accompanying footnotes (*supra*).

³⁹ See Chapter 3 of this dissertation par 3 5 1, especially par 3 5 1 2 3 and accompanying footnotes (*supra*).

Association Inc v Hudnut.⁴⁰ In his assessment, Easterbrook J found that the ordinance constituted thought control in that it established an approved view of women. When confronted by the radical feminist contention that sexually explicit material subordinates women, Easterbrook J's reasoning becomes somewhat nebulous. He clearly struggles to dismiss the notion that mere words and images cannot in themselves cause injury and are accordingly harmless. In fact, by conceding that he accepts the premises of the ordinance, Easterbrook J agreed that depictions of subordination tend to perpetuate subordination and that the subordinate status of women leads to affront and lower pay at work, insult and injury at home and battery and rape on the streets. I find it perplexing, however, that although the court was prepared to accept the hypothesis of the ordinance on the basis that people often act in accordance with the images and patterns around them, this was not sufficient to save Dworkin and MacKinnon's conception of pornography from constitutional impugnement.⁴¹ In my view, Easterbrook J's justification raises even more concern. Apparently, the subordination and other gender-specific consequences which result from sexually explicit images merely demonstrate the power of pornography as a mode of speech. It would thus seem that the harm articulated by the ordinance underscores the importance of affording pornography constitutional protection. If this is a correct assumption, Easterbrook J's argument when drawn to its logical conclusion can only be understood to mean that the more harm a particular mode of expression causes, the more constitutional protection it deserves. To my mind, the Court of Appeals thus seems to effectively employ the freedom of speech guarantee of the First Amendment to immunize discrimination and sexual abuse from legal remedy.

To my mind, the attempts by Cass Sunstein and Donald Alexander Downs to formulate a response to the radical feminist conception of pornography appear to amount to no more than a thinly veiled attempt to marry the notion of prurience with what the authors construe as feminist concerns.⁴² Since both these proposals result from the Supreme Court's failure to address violent sexually depictions, Sunstein and Downs each seek to conceive a definition of pornography that would address this failure and yet be compatible with the guarantees afforded by the First Amendment. Sunstein's conception of high-value or high-level speech turns on the idea that, at its core, the First Amendment serves to protect political speech. Consequently, since pornography is neither related to the central political concerns of the First Amendment nor has any cognitive appeal, it can safely be categorised as low-value speech which deserves no constitutional protection. The fact that pornography falls within the general class of low-value

⁴⁰ 771 F2d 323 (1985).

⁴¹ See Chapter 3 of this dissertation par 3 5 1 4 and accompanying footnotes (*supra*).

⁴² See Chapter 3 of this dissertation par 3 6 and accompanying footnotes (*supra*).

speech, coupled with the harm that physical abuse causes women, justifies regulation.⁴³

Unlike Sunstein, Downs does not deem it necessary to fashion a new class of expression that could be excluded from First Amendment protection, but is convinced that the matter can be resolved within the parameters of the Supreme Court's established standard of obscenity instead. This leads him to argue that the approach enunciated in *Miller v California*⁴⁴ can be modified to include reference to violent sexual depictions. In his view, such a modified standard of obscenity can be seen as reconciling feminist and conservative viewpoints on the matter. The modified test would constitute so-called violent obscenity which would not enjoy protection under the First Amendment.

I have serious reservations about whether these two proposals significantly advance the debate about adult heterosexual pornography. Sunstein's conception of pornography as low-value speech on the basis that it does not make a useful contribution to political debate is not merely far removed from the Supreme Court's philosophical justification of freedom of expression, but is unlikely to be embraced by United States courts in general. In fact, the Court of Appeals for the Seventh Circuit refused to entertain the notion that pornography defined by the ordinance for Indianapolis constituted so-called low-value speech. To my mind, the primary shortcoming of Downs' proposal is his decision to still address the issue of violent pornography under the obscenity standard of the Supreme Court.⁴⁵ Since Downs couples violent pornography with the Supreme Court's test of obscenity, he conceptualises violent depictions as unconstitutional because they affront our sensibilities. Sexual violence is thus a type of speech which is obscene, in other words, immoral. Consequently, Downs does not link violent pornography to any other constitutional right other than freedom of expression. It thus becomes theoretically challenging to extend his argument with a view to link violence against women to the pressing constitutional concerns of equality, dignity and security of the person. It remains difficult to see how an abstract system of free speech - to which the Supreme Court subscribes - can accommodate Downs' conception of pornography. If United States First Amendment law has no theoretical means to accommodate hate speech, it is unlikely that the Supreme Court will construe violent pornography harmful under the rubric of the First Amendment. The libertarian conception of harm is thus unlikely to accommodate Downs' proposal for legal reform. Downs' failure to appreciate the philosophical and intellectual basis of the paradigm within which he elects to frame his argument against pornography leads him to lump together what he construes as

⁴³ See Chapter 3 of this dissertation par 3 6, especially par 3 6 1 and accompanying footnotes (*supra*).

⁴⁴ See n 26 (*supra*).

⁴⁵ See Chapter 3 of this dissertation par 3 6, especially par 3 6 2 and accompanying footnotes (*supra*).

feminist concerns about pornography with those of conservatives. He seems to think that the former will be satisfied by merely pasting an additional component to an already highly unsatisfactory (and ineffective) standard. Although conservative and radical feminist arguments against pornography may show a surface similarity, their respective arguments proceed from two distinct theoretical positions. Whereas conservative initiatives proceed from the basis that pornography affronts our moral sensibilities, radical feminism understands pornography to be inextricably linked to our social organization. Radical feminist thinking therefore conceptualises pornography as a constitutional issue which bears on women's interests in equality, dignity and physical integrity, while it is not, by contrast, the primary objective of a conservative argument against pornography to secure the legal, social and political advancement of women. Moral condemnation stands at the centre of a conservative response to pornography, birth control and issues affecting gays and lesbians. Since a conservative argument has no theoretical means of recognising the intricate power relations at play, sexual violence against women is not seen as a constituent part of patriarchal relations. The interrelationship between violence and (women's) sexuality remains unexplored because sexuality is not understood as a social construct. Since moralistic sentiments underscores both a conservative and a traditional liberal understanding of pornography, it becomes extremely difficult to launch a gender-specific analysis from within these two respective frameworks. As long as Sunstein and Downs elect to frame their constitutional responses within the ambit of the First Amendment, they are unlikely to address the pressing issues which radical feminists have highlighted in respect of pornography, notably the impact of male dominance on women's sexuality and indeed our entire social organization.

7 2 3 The Canadian Alternative

In contrast to United States First Amendment obscenity jurisprudence, Canadian law seems far more sensitive to the impact of pornography on the social and political status of women. My assessment of the jurisprudence of the Supreme Court of Canada has revealed that the court seeks to assess the level of sexual explicitness that Canadian society is likely to tolerate.⁴⁶ In the 1980s, Canadian policy makers have grappled with the issue of pornography and their efforts produced two statutory attempts to reform obscenity law in Canada. Whereas the first statutory attempt at reform failed by virtue of its overtly conservative notions of pornography and harm,⁴⁷ the second attempt at legal reform ran into difficulties when it sought to reach an illusive

⁴⁶ See Chapter 4 of this dissertation par 4 2 1 and par 4 2 2 and accompanying footnotes (*supra*).

⁴⁷ See Chapter 4 of this dissertation par 4 2 3 and accompanying footnotes (*supra*).

compromise between conservatives and feminists.⁴⁸ Then, five years after the second attempt to reform Canadian obscenity law, the Supreme Court of Canada was called upon to revisit the pornography issue in *Regina v Butler*.⁴⁹ In this landmark decision, the Supreme Court had to address two constitutional issues.⁵⁰ First, the court had to ascertain whether section 163(8) of the Criminal Code of Canada⁵¹ which proscribes any publication, a dominant characteristic of which is the undue exploitation of sex (or sex coupled with crime, horror, cruelty and violence) violates section 2(b) of the Canadian Charter of Rights and Freedoms⁵² which guarantees the right to freedom of expression. In the event that section 163(8) of the Criminal Code was found to violate section 2(b) of the Charter, the second issue which the court had to address was whether section 163(8) of the Criminal Code could be demonstrably justified under section 1 of the Charter as a reasonable limit prescribed by law.

The Supreme Court suggested a useful conception of pornography by dividing pornography into three categories, namely explicit sex coupled with actual physical violence or threats of physical violence, explicit sex without actual violence or threats of violence but which subjects people to treatment that is degrading or dehumanizing and explicit sex without violence that is neither degrading nor dehumanizing. By virtue of the fact that the Supreme Court found that the first two categories of pornography are expressly proscribed by section 163(8) of the Criminal Code, the court could conceptualise the harm of pornography in relation to the anti-social conduct which result from exposure to these identified categories of pornography.⁵³ It is of particular significance that, unlike its United States counterpart, the Supreme Court was prepared to conceptualise the harm of pornography in gender-specific terms, thereby recognizing that pornography may result in the physical or mental mistreatment of women by men. The court was therefore prepared to accept the premise of the radical feminist rationale for the prohibition of pornography, namely that pornography has serious and determinable consequences which impact directly on women's constitutional interests in equality, human dignity and physical integrity.

⁴⁸ See Chapter 4 of this dissertation par 4 2 4 and accompanying footnotes (*supra*).

⁴⁹ [1992] 89 DLR (4th) 449.

⁵⁰ See Chapter 4 of this dissertation par 4 3 2 and accompanying footnotes (*supra*).

⁵¹ Criminal Code RSC C-46 of 1985.

⁵² Constitution Act of 1982 Part I.

⁵³ See Chapter 4 of this dissertation par 4 3 3 and accompanying footnotes (*supra*).

In its assessment of whether section 163(8) of the Criminal Code is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, the Supreme Court chose not to follow earlier Canadian precedents which conceptualised pornography strictly as a moralistic issue.⁵⁴ Instead, the court interpreted the overriding objective of section 163 of the Criminal Code as the avoidance of harm to society. In the court's view, the objective of section 163 of the Criminal Code is not, therefore, moral disapprobation, but the avoidance of harm to women. The harm caused by the proliferation of materials which impact on the values that are fundamental to Canadian society thus constitutes a substantial constitutional concern which justifies the restriction of freedom of expression. And since all democratic societies recognise certain limits to freedom of expression, the Supreme Court found section 163 of the Criminal Code to constitute a valid objective which justifies an encroachment on the right to freedom of expression. It is also to be welcomed that the court recognised that pornography effectively reduces women to their sexual body parts by depicting them as sexual playthings, hysterically and instantly responsive to male sexual demands and that pornography thus deprives women of a unique human character or identity. Consequently, since the kind of expression which pornography seeks to advance does not stand on equal footing with other modes of expression, the Supreme Court found the effects of section 163 of the Criminal Code in proportion to its legislative objective and thus to constitute a reasonable and justifiable limit prescribed by law.

The position adopted by the Supreme Court of Canada in respect of hate propaganda is, to my mind, equally useful in a discourse on the constitutional ramifications of adult heterosexual pornography. In *Regina v Keegstra*,⁵⁵ the Supreme Court related the prohibition of hate propaganda in section 319(2) of the Canadian Criminal Code to the guarantees of equality and multiculturalism in the Canadian Charter of Rights and Freedoms.⁵⁶ In recognizing the substantial harms that can flow from hate propaganda targeted at designated racial, ethnic or religious groups in Canadian society, the Supreme Court rejected the requirement of a clear and present danger insisted upon by the Supreme Court of the United States before expression may be restricted. Consequently, the analytical techniques employed by United States courts which effectively predetermine whether (and under what circumstances) expression may be limited is not endorsed by Canadian courts.⁵⁷ The Supreme Court argued that by virtue of the fact that hate speech undermines the value of protecting and fostering a vibrant democracy in that it denies

⁵⁴ See Chapter 4 of this dissertation par 4 3 4 and accompanying footnotes (*supra*).

⁵⁵ [1990] 3 SCR 697.

⁵⁶ See Chapter 4 of this dissertation par 4 4 3 and accompanying footnotes (*supra*).

⁵⁷ See Chapter 4 of this dissertation par 4 4 5 and accompanying footnotes (*supra*).

citizens equality and meaningful participation in the political process, hate propaganda undercuts the self-development and human flourishing among all members of society. And by engendering intolerance and prejudice, hate propaganda violates the Charter guarantees of equality and multiculturalism. The Supreme Court thus concluded that these two Charter clauses, read with the hate propaganda provision of the Criminal Code, justify a limitation of the right to freedom of expression.

Although I agree that one must guard against restricting the rationale for the prohibition of hate propaganda to historically marginalised or disadvantaged groups, the equality-centred harm-based framework employed by the Canadian Supreme Court in respect of freedom of expression could nevertheless facilitate a strong gender-specific constitutional argument against adult heterosexual pornography.⁵⁸ Within this legal and constitutional framework, it becomes possible to formulate an argument against a particular category of pornographic material that is made through the use of force, violence or coercion. Hate speech pornography, thus defined, is far removed from the values of fostering a vibrant and creative society, vigorous and open debate essential to democratic politics and a society which fosters the self-actualisation and freedom of its members.⁵⁹ The values articulated by the Canadian Supreme Court will undoubtedly also underscore an assessment of pornography in relation to section 16(2)(c) of the South African Constitution which expressly prohibits the advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm. Moreover, the values which assisted the Supreme Court in balancing the restriction of freedom of expression in relation to the requirements of the limitation clause in the Canadian Charter may also prove to be of great value when section 16(2)(c) is assessed in relation to section 36 of the South African Constitution.

7 2 4 A Suitable Conception of Harm and Legal Definition of Adult Heterosexual Pornography for South African Law

By virtue of its common law heritage, South African law, not surprisingly, adopted a strict moralistic stance on all matters relating to the sexually explicit.⁶⁰ But the issue was significantly complicated by the fact that South African courts, together with the legal system as a whole, were charged with the task of furthering a particular conservative moralism and damaging political

⁵⁸ See Chapter 4 of this dissertation par 4 4 6 and accompanying footnotes (*supra*).

⁵⁹ See Chapter 4 of this dissertation par 4 4 7 and accompanying footnotes (*supra*).

⁶⁰ See Chapter 5 of this dissertation par 5 2, especially par 5 2 1 and accompanying footnotes (*supra*).

ideology. As a consequence, Calvinist puritanism and apartheid ideology became beacons for political intervention and legislative reform.⁶¹ These conditions, *inter alia*, resulted in the complete disregard of the cultural and religious diversity of South Africans and the fundamental rights of every citizen.

With the inception of a supreme constitution and justiciable bill of rights after the first democratic elections in 1994, it became evident that a new statutory measure to address film and publication control was required.⁶² A new control structure was consequently designed on the basis of the classification of material and the demarcation of age restrictions. Mindful of the various rights and freedoms enshrined in the Bill of Rights in the Interim Constitution⁶³ as well as in various international and regional human rights instruments, the ensuing Films and Publications Act⁶⁴ expressly prohibits films and publications which contain a simulated or real presentation of persons under the age of eighteen years engaging in "sexual conduct" or "a lewd display of nudity"⁶⁵ as well as films and publications which contain a presentation of "explicit violent sexual conduct",⁶⁶ "bestiality",⁶⁷ "explicit sexual conduct which degrades a person and which constitutes incitement to cause harm"⁶⁸ or "extreme violence which constitutes incitement to cause harm".⁶⁹ The Act also expressly prohibits films and publications⁷⁰ which amount to propaganda for war,⁷¹ incites to imminent violence⁷² or advocates hatred that is based on race,

⁶¹ See Chapter 5 of this dissertation par 5 2 2 - par 5 2 5 and accompanying footnotes (*supra*).

⁶² See Chapter 5 of this dissertation par 5 3, especially par 5 3 1 and accompanying footnotes (*supra*).

⁶³ Act 200 of 1993.

⁶⁴ Act 65 of 1996.

⁶⁵ See Schedule 1(1)(a) and Schedule 6(1)(a) of Act 65 of 1996 (*supra*).

⁶⁶ See Schedule 1(1)(b) and Schedule 6(1)(b) of Act 65 of 1996 (*supra*).

⁶⁷ See Schedule 1(1)(c) and Schedule 6(1)(c) of Act 65 of 1996 (*supra*).

⁶⁸ See Schedule 1(1)(d) and Schedule 6(1)(d) of Act 65 of 1996 (*supra*).

⁶⁹ See Schedule 1(1)(e) and Schedule 6(1)(e) of Act 65 of 1996 (*supra*).

⁷⁰ This prohibition also applies to any public entertainment or play: see section 29(3)(a) - (c) of Act 65 of 1996 (*supra*).

⁷¹ See sections 29(1)(a) and 29(2)(a) of Act 65 of 1996 (*supra*).

⁷² See sections 29(1)(b) and 29(2)(b) of Act 65 of 1996 (*supra*).

ethnicity, gender or religion and which constitutes incitement to cause harm.⁷³ The latter prohibition is in step with the position adopted in other southern African democracies, notably Zimbabwe and Namibia.⁷⁴ Films and publications not expressly prohibited must be accompanied with age restrictions,⁷⁵ such publications may only be distributed in a sealed and, if necessary, opaque wrapper⁷⁶ or be distributed and/or exhibited by the holder of a licence to conduct the business of adult premises.⁷⁷

The South African market has indeed been flooded by sexually explicit material ever since the Films and Publications Act entered into force in June 1998.⁷⁸ As a result, members of the Film and Publication Board have been compelled to adopt a strategy whereby up to ten films are watched and classified in a two-hour session. The majority of these films fall into the so-called X18 category which means that although they are not prohibited, these films may only be distributed and/or exhibited by the holder of a licence of adult premises.

A reading of the first (and to date only) decision of the South African Constitutional Court on pornography leaves one with the distinct impression that the majority of the court endeavoured to reveal as little as possible about its stance on the constitutional challenges raised by adult heterosexual pornography.⁷⁹ To my mind, the Constitutional Court's treatment of the human rights issues engendered by pornography in *Case; Curtis v Minister of Safety and Security*⁸⁰ raises three pressing concerns. These concerns respectively relate to the fact that the majority of the court elected to frame the question whether section 2(1) of the Indecent or Obscene

⁷³ See sections 29(1)(c) and 29(2)(c) of Act 65 of 1996 (*supra*).

⁷⁴ See Chapter 5 of this dissertation par 5 3 2 and accompanying footnotes (*supra*).

⁷⁵ See Schedule 3(1) of Act 65 of 1996 (*supra*).

⁷⁶ See Schedule 3(2) of Act 65 of 1996 (*supra*).

⁷⁷ See section 24 of Act 65 of 1996 (*supra*). See also section 2 read with item 2 of Schedule 1 of the Businesses Act 71 of 1991.

⁷⁸ See Chapter 5 of this dissertation par 5 3 3, especially par 5 3 3 2 and accompanying footnotes (*supra*).

⁷⁹ See Chapter 5 of this dissertation par 5 4 and accompanying footnotes (*supra*).

⁸⁰ 1996 (5) BCLR 609 (CC).

Photographic Matter Act⁸¹ violated the rights to equality,⁸² privacy,⁸³ freedom of conscience,⁸⁴ freedom of speech, expression and artistic creativity⁸⁵ and the right to administrative justice⁸⁶ entrenched in the Interim Constitution primarily as a matter of personal privacy. In doing so, the majority of the Constitutional Court effectively shied away from formulating a working definition of pornography and seemed decidedly ambivalent at times in the course of its assessment of pornography.⁸⁷

To my mind, three (interrelated) problems arise from the fact that the court found that section 2(1) of the Indecent or Obscene Photographic Matter Act violated the right to privacy guaranteed in section 13 of the Interim Constitution. The first problem pertains to the use of the words "erotic material".⁸⁸ Although the majority of the Constitutional Court found that such material enjoys protection under the Bill of Rights in the Interim Constitution, they gave no indication of the basis on which a legal distinction is to be made between "erotic" and other sexually explicit material. Although the term "erotica" bears a distinct meaning within radical feminist thinking, the Constitutional Court gave no indication of whether it subscribes to this particular conception. In my view, the failure of the majority of the Constitutional Court to entertain the radical feminist argument that some link (or correlation) exists between acts of sexual violence against women and violent sexually explicit images is a strong indication that the court does not (or is unlikely to) entertain a radical feminist conception of pornography and its harm.

The second difficulty which arises from the Constitutional Court's decision to prioritise the right to privacy relates to the fact that the court unavoidably elected to assess the constitutionality of the Indecent or Obscene Photographic Matter Act against the constitutional rights and interests of the individual.⁸⁹ To my mind, this course of action bears the following constitutional

⁸¹ Act 37 of 1967.

⁸² See section 8 of Act 200 of 1993 (*supra*).

⁸³ See section 13 of Act 200 of 1993 (*supra*).

⁸⁴ See section 14(1) of Act 200 of 1993 (*supra*).

⁸⁵ See section 15 of Act 200 of 1993 (*supra*).

⁸⁶ See section 24 of Act 200 of 1993 (*supra*).

⁸⁷ See Chapter 5 of this dissertation par 5 4 2 and accompanying footnotes (*supra*).

⁸⁸ See Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 1 and accompanying footnotes (*supra*).

⁸⁹ See Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 1 and accompanying footnotes (*supra*).

consequences: First, the autonomy, freedom and inviolability of the individual are prioritised at the expense of other fundamental values, notably equality and human dignity. Secondly, by employing a liberal-inspired framework, the Constitutional Court assumes that the distinction that liberal thinkers typically draw between the private and public sphere is valid. My assessment of liberal feminist thought has shown that as a political theory, even liberal feminism struggles to conceive of the possibility that the private sphere may be an institution that oppresses and exploits women physically, emotionally and sexually. And since liberal feminism cannot conceptualise the ways in which sexuality and sexual experiences may be related to the dominant structures of patriarchal power, domestic violence is rendered invisible, rape becomes an unfortunate (and random) personal experience and sexual activity - including the use of sexually explicit material - is simply a matter of individual, private choice. The concept of a private area of life free from power struggle and political interference is indeed far removed from a position which emanates from the understanding that all existing social institutions and relationships - whether private or public - are part of a (patriarchal) power struggle. By electing to prioritise the right of the individual to do whatever he may wish in the privacy of his home, the Constitutional Court fails to appreciate that both the private and public sphere are seats of women's oppression. The court's observation to the effect that "[i]t seems strange that what one can do in the privacy of one's bedroom one cannot look at in one's bedroom" seems to proceed from the assumption that the private domain is indeed one place where women do not suffer (often horrific) subordination. The Constitutional Court thus effectively overlooked the reality of rape, sexual assault and battery which South African women face in their homes and elected to not only award constitutional protection to material which implicate women's sexuality, but also to condone the presence of such material in the bedroom.

The final aspect of the Constitutional Court's treatment of pornography as a right to privacy issue that I find problematic relates to the fact that the court - in so doing - effectively side stepped the other constitutional issues raised by the applicants.⁹⁰ Although Mokgoro J did venture forth and conceptualised sexually explicit material as a mode of expression, the majority of the Constitutional Court found it unnecessary to assess how section 2(1) of the Indecent or Obscene Photographic Matter Act relates to the issues of freedom of expression, equality, freedom of conscience and fair administrative justice. The majority of the court thus effectively circumvented those issues in relation to adult heterosexual pornography that arguably stand most in need of constitutional interpretation and assessment in South African law.

Apart from the problems discussed above, the Constitutional Court's conception of pornography also constitutes reason for concern. Apart from Mokgoro J who defined pornography as

⁹⁰

See Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 1 and accompanying footnotes (*supra*).

“sexually explicit expression” and “sexually expressive speech”, the majority of the Constitutional Court refrained from proposing a (working) definition of pornography.⁹¹ Yet the conclusion reached in respect of the constitutionality of the Indecent and Obscene Photographic Matter Act implies that the court must have employed *some* conception of pornography. Terminology such as “repulsive behaviour”, “evil”, “depraved”, “obnoxious” and “unbearably vile pictures” point towards a moralistic understanding and condemnation of pornography. Since a moralistic condemnation is unavoidably premised upon a conception of pornography as a mode of expression which appeals to the prurient interest and which must be assessed on the basis of the likes and dislikes of the average person in relation to (contemporary) community standards, I find the Constitutional Court’s course of action unfortunate. And since it is not the primary objective of a moralistic condemnation of pornography to secure the legal, social and political advancement of women, the Constitutional Court’s train of thought does not bode well for South African women and their constitutional interests in an equitable and safe society.

These problems are exacerbated by the fact that the majority of the Constitutional Court displayed a measure of ambivalence on at least two occasions in the course of its judgment.⁹² The first trace of ambivalence is detectable in the instance where the court refused to accept the results of research which purport to show a link between violent pornography and the incidence of sexual crimes against women. I find it perplexing that although the court dismissed the results of the research as inconclusive, the majority of the court - in the very same paragraph - nevertheless conceded that material of such a nature is a social evil which may well deserve to be suppressed. Moreover, the bold declaration to the effect that the erotic material that an individual may choose to keep within the privacy of his home is nobody’s business (and certainly not the business of the state) is somewhat puzzling when juxtaposed with the statement that it may well prove to be both reasonable and justifiable for society to mind the private business of its members. A second instance of ambivalence in the Constitutional Court’s assessment is revealed when the majority - on the one hand - views the matter as one of fettering with premature decisions, yet - at the same time - declares pornography to be an important and contentious issue. This rather indifferent treatment of adult heterosexual pornography in relation to women’s constitutional interests in equality, human dignity and physical integrity is unlikely to either foster an understanding of pornography as a women’s issue or to secure an end to all practices of gender discrimination.

To my mind, South African courts - and the Constitutional Court in particular - need to embrace

⁹¹ See Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 2 and accompanying footnotes (*supra*).

⁹² See Chapter 5 of this dissertation par 5 4 3, especially par 5 4 3 3 and accompanying footnotes (*supra*).

a conception of adult heterosexual pornography and its harm which emanates from the actual socio-political conditions of women under a pervasive system of male dominance.⁹³ Any attempt to articulate the harm of adult heterosexual pornography must accordingly be gender-specific and proceed from a proper appreciation of our social design. The socio-political reality of South African women accentuates that the context within which the constitutional implications of pornography must be decided is not exclusively that of a history of oppressive conservatism. South Africa's history of racial and gender oppressive inequality also created a climate in which social evils - notably violence against women - could flourish. The law therefore needs to appreciate the dynamics of a patriarchal society which produces, functions and is indeed sustained on the basis of a power imbalance between the sexes which, in turn, finds expression in institutionalised inequality, domination, sexism and violence. Because these are the conditions which shape our social organisation, the law must respond to all structures that are related to women's state of inequality and subordination. Adult heterosexual pornography - together with prostitution and sexual violence - indeed shape women's very sexual identity. And since pornography is pervasive, inescapable and public, it becomes a relevant factor in the continued sexism and sexual violence to which women are subjected under conditions of male dominance.

It follows that the law needs to explore the role of pornography in the construction of powerful subject positions through which women lead their lives, the role of pornography in the creation and reinforcement of male dominance and female subordination, the possible correlation between pornography and instances of sexual violence against women and the role of pornography in placing women in a disempowered state of sexual submission and servility. Only once these socio-political conditions are recognised, will it become possible to articulate an accurate (legal) conception of the harm of pornography. And only once the harm of pornography is articulated in relation to the actual conditions of women, will the dehumanisation of women in a culturally-specific and empirically-descriptive sense be revealed. The law will then be in a position to respond to the fact that pornography purports to define what a woman is - on a group as well as an individual basis.

To my mind, such a conception of the harm of adult heterosexual pornography can sustain two definitions of pornography,⁹⁴ each emanating from the two feminist paradigms which I elected to employ in this study. A definition cast within the ambit of radical feminist thought must be decidedly gender-specific so as to articulate the impact of pornography on women's sexual identity, autonomy and status. As a matter of principle, a definition which does not turn on

⁹³ See Chapter 5 of this dissertation par 5 5, especially par 5 5 1 and accompanying footnotes (*supra*).

⁹⁴ See Chapter 5 of this dissertation par 5 5, especially par 5 5 2 and accompanying footnotes (*supra*).

sexual arousal or prurience, nor one which relies on the tastes and attitudes of the average person or degree of sexual explicitness, degradation or violence which a community is likely to tolerate, is to be preferred. The appropriate definition must not, therefore, constitute a moralistic condemnation of adult heterosexual pornography, but must be one that is capable of facilitating a constitutional analysis of pornography with specific reference to women's interests in equality, dignity and physical integrity. This means that a suitable definition of pornography cast within a radical feminist framework must not merely seek to proscribe violent or degrading sexually explicit material as the Supreme Court of Canada and the Films and Publications Act have elected to do. The definition must accordingly stand in recognition of the fact that all pornography is potentially problematic because all pornography - whether labelled "hard core", "soft porn" or "violent and degrading" - objectify women as a class, all pornography can invoke constitutional scrutiny, on condition that its harm is suitably articulated.⁹⁵

I accordingly propose a definition of adult heterosexual pornography which conceptualises pornography as the graphic, sexually explicit representation of women within a context of unequal gender power relations, subordination, objectification, degradation, dehumanisation or sexualised violence which suggests endorsement or approval of such behaviour or acts. This definition has been conceived with the express intent not to implicate sexual explicitness *per se* or sexually explicit material that has *bona fide* artistic, scientific or educational value. My definition recognises that there exist sexually explicit depictions of women which are not pornographic as well as material that, although they subordinate women, are not sexually explicit and therefore do not constitute pornography. Therefore, to be regarded pornography, material must be simultaneously directed at the male heterosexual market, be graphic and sexually explicit, be situated in a gender-specific context of objectification, subordination, dehumanisation or violence and suggest endorsement or approval of such behaviour or acts. Harm is accordingly conceptualised in terms of sexual objectification, subordination and/or sexual violence.

The second definition - cast within the larger liberal feminist paradigm - is intended to sustain an argument against a particular category of adult heterosexual pornography on the basis that it constitutes hate speech within the meaning of section 16(2)(c) of the South African Constitution. Accordingly, pornography can also be defined as the graphic, sexually explicit representation of women which constitutes the advocacy of hatred that is based on gender and that constitutes incitement to cause harm. Once conceptualised as hate speech, this category of pornography will stand in direct conflict with the express prohibition articulated in both section 16(2)(c) of the

⁹⁵

It follows that, since a radical feminist inspired framework accentuates the unequal power relations at play, the constitutional ramifications of pornography can potentially also be analysed in relation to *other* historically marginalised or vulnerable groups or categories of persons. Sexually explicit material which involves gays, lesbians or even transsexuals would therefore also constitute "pornography" for purposes of such a constitutional assessment.

South African Constitution and section 29 of the Films and Publications Act.

7 2 5 Pornography and the South African Constitution: A Violation of Equality, Human Dignity and Physical Integrity?

My first definition of adult heterosexual pornography cast within a radical feminist paradigm can facilitate an assessment of pornography in relation to the rights to equality, human dignity and freedom and security of the person which are entrenched in sections 9, 10 and 12 of the South African Constitution respectively.⁹⁶ The fact that the South African Constitutional Court employs a substantive conception of equality in its interpretation of section 9 of the South African Constitution, indeed sustains an assessment of adult heterosexual pornography with particular reference to the actual socio-political conditions of South African women.⁹⁷ By seeking to address the very real consequences of racist and sexist structures or practices that flourished under the pervasive ideology of apartheid, the Constitutional Court recognises that in order to give real meaning to the constitutional commitment to equality, the actual social, legal and political conditions of individuals or groups in South African society need to be examined.

In analysing whether a law or conduct violates any part of section 9 of the South African Constitution, the Constitutional Court has devised an enquiry in three parts.⁹⁸ The first stage of the enquiry necessitates an assessment of whether adult heterosexual pornography infringes section 9(1). The Constitutional Court has interpreted section 9(1) to the effect that although mere differentiation will very rarely constitute unfair discrimination (because it would be impossible to govern a modern country like South Africa efficiently without differentiations and classifications which treat people differently and impact on them differently), such differentiation may nevertheless fall foul of this subsection. Section 9(1) therefore has two aspects - first, that everybody is entitled to equal treatment by South African courts and secondly, that nobody should be above or beneath the law and all are subject to law or conduct impartially applied and administered. It follows that mere differentiation will fall foul of both aspects of section 9(1) if the state did not act in a rational manner when differentiating between individuals or groups of individuals.⁹⁹ But the state may find this requirement relatively easy to satisfy. To my mind, the requirement of rationality is one which the state will certainly almost always be able to meet, for

⁹⁶ See Chapter 6 of this dissertation par 6 3 and accompanying footnotes (*supra*).

⁹⁷ See Chapter 6 of this dissertation par 6 4, especially par 6 4 1 and accompanying footnotes (*supra*).

⁹⁸ See Chapter 6 of this dissertation par 6 4 2, especially par 6 4 2 1 and accompanying footnotes (*supra*).

⁹⁹ See Chapter 6 of this dissertation par 6 4 2, especially par 6 4 2 3 and accompanying footnotes (*supra*).

the state merely has to show that the differentiation in question is in some way (rationally) related to a legitimate government purpose or interest.¹⁰⁰ Seen from the vantage point of the complainant, the rational basis test emerges as a rather stringent standard which is virtually bound to frustrate a claim under section 9(1). The high threshold of the test is made even more apparent by the Constitutional Court's insistence that there is no need for the state to prove that the objective could have been achieved in a better or different way. The Constitutional Court's interpretation of section 9(1) therefore effectively compels complainants to frame their equality argument as one of discrimination in terms of section 9(3) of the South African Constitution.

The Constitutional Court's stringent approach to section 9(1) is underscored when adult heterosexual pornography is assessed.¹⁰¹ In exploring whether pornography differentiates between people or categories of people, I have found that since female sexuality is shaped under conditions of gender inequality in patriarchal society, female sexuality is moulded as a social construct out of women's conditions of oppression and inequality. And since pornography implicates women's sexuality, it becomes the means through and in which gender inequality becomes sexual. Through the process of (sexual) objectification, pornography imposes a social meaning on women as a group and it is this meaning which constitutes the basis of differentiation. The question whether the differentiation which is inherent to adult heterosexual pornography bears a rational connection to a legitimate state (or political) purpose must be answered in the affirmative on the premise that our entire social, legal and political organisation is patriarchal.¹⁰² Since the oppression of women is the most fundamental and universal form of domination under patriarchy, pornography - as part of a universal, ubiquitous system of male domination - plays a fundamental role in the sexually based subordination of women. Together with other structures of male dominance, pornography serves to maintain patriarchy and the power difference between the sexes through the process of sexual objectification. By constructing female (sexual) identity, pornography serves a distinct (patriarchal) purpose which is both legitimised through and maintained by the process of conditioning, socialisation and education. The level at which pornography differentiates between men and women in an ubiquitous system of male dominance could thus well be said to bear a rational connection to the (political/state) purpose served by pornography. In fact, the sexual objectification of women through and in pornography is a rational consequence of the politics of patriarchy. It follows that because it could be argued that the differentiation in question indeed bears a rational connection

¹⁰⁰ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 1 and accompanying footnotes (*supra*).

¹⁰¹ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 1 1 and accompanying footnotes (*supra*).

¹⁰² See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 1 2 and accompanying footnotes (*supra*).

to a legitimate political purpose (which is to subordinate women to men in all spheres of our social design), adult heterosexual pornography as a patriarchal practice does not constitute a violation of section 9(1) of the South African Constitution when the interpretation suggested by the Constitutional Court is followed.

An assessment of pornography in terms of section 9(3) hinges on two questions, namely whether the differentiation that is inherent to adult heterosexual pornography amounts to discrimination¹⁰³ and whether, if found to be the case, this constitutes unfair discrimination.¹⁰⁴ According to the Constitutional Court, section 9(3) contemplates two categories of discrimination. Whereas the first is differentiation on one or more of the seventeen grounds specified in the subsection, the second is differentiation on a ground that is analogous to the expressly enumerated grounds. The Constitutional Court has held that if the differentiation is not on a specified ground, the question of discrimination will depend on whether the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. However, if the differentiation is on a ground expressly enumerated in section 9(3), discrimination will have been established. Applied to adult heterosexual pornography, it follows that had the differentiation not been on two listed grounds (namely on the conceptually interrelated grounds of gender and sex), whether the level at which pornography differentiates between men and women amounts to discrimination would direct one to establish whether pornography relates to the unequal treatment of women based on attributes and characteristics attached to women as a group.

The Constitutional Court has articulated a number of factors to guide an assessment of unfairness. These include whether the complainant is a member of a group which has suffered previous disadvantage, the nature of the power in terms of which the discrimination was affected and the nature of the interests which have been affected by the discrimination in question. These factors, applied to adult heterosexual pornography therefore direct a court to examine the role that pornography plays in the construction of women's social and political status. In other words, a court will need to assess pornography in relation to sex discrimination and the construction of women's sexual inequality under patriarchy.

I have found that since adult heterosexual pornography constructs its own specific version of the typical sexual attributes and characteristics that are deemed attractive in women, in a male dominated society, pornography constructs women as sexual objects specifically for the titillation

¹⁰³ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 2 1 and accompanying footnotes (*supra*).

¹⁰⁴ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 2 2 and accompanying footnotes (*supra*).

and sexual gratification of men.¹⁰⁵ This explains why women are presented in pornography as sexually voracious and insatiable, enjoying - and even seeking - brutal sexual violence and humiliation. Reduced to sexual body parts, and often reduced to animals in the language of pornography, women are dehumanised as objects, playthings and pieces of meat. Held forth as sexual objects and presented as sexually passive, servile and violated, women's subordination is construed as sexually exciting and arousing. Pornography thus relentlessly communicates a specific version of female sexuality, sexual inequality and identity. Sexually explicit material that depicts women as existing solely for the sexual satisfaction of men, that depicts women in subordinate roles in their sexual relations with men and that depict women engaged in sexual practices that would be considered humiliating, both create and reinforce the view that women's function is disproportionately to satisfy the sexual needs of men. This view of female sexuality and identity violate the inherent dignity of women as a class. And since human dignity is an underlying consideration in the determination of the Constitutional Court's understanding of unfairness, adult heterosexual pornography would appear to constitute unfair discrimination on grounds of sex and gender.

The Constitutional Court's conception of human dignity indeed underscores my initial assessment.¹⁰⁶ When the position of women in society (coupled with whether the discrimination is on a specified ground or not, the nature of the power in terms of which the discrimination was effected and the purpose sought to be achieved by it) is examined, adult heterosexual pornography indeed amounts to unfair discrimination. Since pornography stands absolutely central to the manner in which the state enforces the (dominant) male viewpoint and particularly the male view of women as sex(ual) objects, pornography is pivotal in creating and maintaining sex as basis for discrimination. As a public, inescapable practice, pornography creates a social reality which women are forced to confront on various levels and creates conditions which invariably lead to an impairment of their fundamental dignity. These conditions undermine women's social status in that they confirm gender-specific stereotypes and prejudice. Consequently, adult heterosexual pornography falls foul of section 9(3) of the South African Constitution as unfair discrimination on grounds of both gender and sex.

Once it has been determined that adult heterosexual pornography constitutes unfair discrimination, the question whether pornography can nevertheless be justified under the

¹⁰⁵ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 2 2 and accompanying footnotes (*supra*).

¹⁰⁶ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 2 2 and accompanying footnotes (*supra*).

limitation clause of the South African Constitution must be assessed.¹⁰⁷ If pornography is found to constitute unfair discrimination, this would amount to a violation of the right to equality which can only be justified in terms of section 36 if the relationship between the purpose and effect of pornography is closely drawn. This means that if the (political) purpose of pornography is not closely drawn to the differentiation that pornography facilitates between men and women (in other words, if the differentiation is arbitrary), the requirements of the limitation clause will not be met.

My assessment of adult heterosexual pornography in relation to section 9(1) has revealed, however, that the level at which pornography differentiates between the sexes is inextricably related to the purpose of pornography in a male dominated society. Consequently, since the differentiation is closely drawn to the political object of pornography, pornography as patriarchal structure could well be construed as a reasonable and justifiable limitation of the right to equality. It remains difficult to see, however, how differentiation that constitutes unfair discrimination in terms of section 9(3) can ever be justified in an open and democratic society based on the very values which aided the conclusion that the discrimination in question had been unfair in the first place.¹⁰⁸ I accordingly find it perplexing that differentiation which has been shown to be based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be reasonable and justifiable in a society based on the fundamental constitutional values of human dignity, equality and freedom and which is still ravaged by the effects of past unfair racist and sexist prejudice and discrimination.

My assessment of adult heterosexual pornography within the ambit of the right to freedom and security of the person entrenched in section 12 of the South African Constitution has revealed that the abuse, torture and maiming of women forms an integral part of the production of pornography.¹⁰⁹ A cross-selection of depictions which appear in mainstream sexually explicit publications such as *Hustler*, *Penthouse* and *Playboy* reveal horrific gender-specific acts of cruelty, torture, violence and inhuman or degrading treatment. Violence in South Africa is rife and gender-specific violence and brutality has reached epidemic proportions which have on occasion been described as endemic to South African society. Studies conducted by the South African Medical Research Council's Division for Women's Health underscore that violence

¹⁰⁷ See Chapter 6 of this dissertation par 6 4 3, especially pae 6 4 3 3 and accompanying footnotes (*supra*).

¹⁰⁸ See Chapter 6 of this dissertation par 6 4 3, especially par 6 4 3 3 and accompanying footnotes (*supra*).

¹⁰⁹ See Chapter 6 of this dissertation par 6 5, especially par 6 5 3 and accompanying footnotes (*supra*).

against women is the product of social conditioning.¹¹⁰ In South African society, the reported reasons for conflict indeed confirm an association (or a correlation) between violence against women and patriarchal conceptions of gender and sex roles. Conflict between men and women is mainly associated with attempts by men to control “their” women, “their” sexuality and “their” households.

The point that needs to be made is that in a male dominated society, women are sexually assaulted because they are women - not individually or at random, but on the basis of their sex and by virtue of their membership of a group defined by gender. It is therefore reasonable to conclude that depictions of sexually explicit violence and brutality in a context which suggests approval or endorsement of such acts or behaviour is a factor which contributes to the creation of a culture of gender-specific violence which, in turn, is likely to promote or encourage similar behaviour in those exposed to such depictions. And in light of South Africa’s history of discrimination, marginalisation and violence and in the context of the philosophy of *ubuntu*, it is likewise reasonable to proscribe practices which condone the maltreatment, physical abuse and subjugation of certain groups in society on the basis that such acts or behaviour cannot be tolerated in a legal and constitutional order founded on the core values of equality, human dignity and freedom and which purports to protect women’s right to freedom and security of the person and their rights to bodily and psychological integrity.

The question whether a particular category of adult heterosexual pornography constitutes a hateful mode of expression within the meaning of section 16(2)(c) of the South African Constitution necessitates a suitable conception of hate speech.¹¹¹ Since section 16(2)(c) contains both abstract and concrete requirements, the offending expression should first carry a message of hatred where after it must be assessed whether the offending expression constitutes incitement to cause harm.

Hate speech, by its very nature, is more than a remark that co-incidentally offends the target person or group.¹¹² Instead, hate speech constitute words and modes of expression that are calculated to dehumanise, degrade and subjugate. Consequently, hate speech perpetuates negative stereotypes and promotes discrimination, thereby maintaining the inferior status of the targeted group and hampering their participation in society. To my mind, the advocacy of hatred encompasses an additional dimension when directed towards historically marginalised groups.

¹¹⁰ See Chapter 6 of this dissertation par 6 5, especially par 6 5 4 and accompanying footnotes (*supra*).

¹¹¹ See Chapter 6 of this dissertation par 6 6 and accompanying footnotes (*supra*).

¹¹² See Chapter 6 of this dissertation par 6 6, especially par 6 6 3 and accompanying footnotes (*supra*).

Under these circumstances hate speech is particularly effective, for it emanates from a socially constructed position of power and thus forms part of a history of domination and a context of disempowerment and injury. In *Regina v Keegstra*,¹¹³ the Supreme Court of Canada indeed conceptualised the harm that may result from hate propaganda in relation to its psychological and social consequences. Although found to constitute a limitation of freedom of expression, the court upheld section 319(2) of the Canadian Criminal Code¹¹⁴ as a reasonable and justifiable limitation in the interest of equality and the cultural diversity of Canadians, both of which find express recognition in the Canadian Charter of Rights and Freedoms.¹¹⁵

Although it may be convenient to do so in the case of adult heterosexual pornography, it may prove unwise to restrict the concept of harm in relation to section 16(2) of the South African Constitution to physical violence.¹¹⁶ Such an interpretation may well run the risk of collapsing the hate speech provision into the incitement to imminent violence provision. To my mind, the broad conception of harm employed by the Canadian Supreme Court in *Regina v Keegstra* corresponds well to the purpose of section 16(2)(c) for the simple reason that hate speech causes the very harm articulated by the Canadian Supreme Court. By accentuating the broad psychological harmful effects of hate speech on members of the target group in question, the Supreme Court brings to light the types of harm caused by this particular mode of expression. It follows that the speech itself - and not the audience who may act on the message it conveys - causes the social and psychological harm against which section 16(2)(c) acts.

To my mind, adult heterosexual pornography which conveys a message of gender-specific inferiority and conceptualises women as servile, degrading and dehumanised, corresponds with the very characteristics of hate speech.¹¹⁷ As hate speech, pornography thus wields the power to wreak social damage in that a significant portion of the population is humiliated by its constitutionally accountable misrepresentation. By accentuating the degradation and dehumanisation of women in pornography, it could thus well be argued that adult heterosexual pornography constitutes hate speech within the meaning of section 16(2)(c) of the South African Constitution. Once it has been established that pornography could be construed as hate speech, the question whether pornography constitutes incitement to cause harm must be assessed.

¹¹³ [1990] 3 SCR 697.

¹¹⁴ Criminal Code RSC C-46 of 1985 (*supra*).

¹¹⁵ Constitution Act of 1982 Part I (*supra*).

¹¹⁶ See Chapter 6 of this dissertation par 6 6, especially par 6 6 4 and accompanying footnotes (*supra*).

¹¹⁷ See Chapter 6 of this dissertation par 6 6, especially par 6 6 4 and accompanying footnotes (*supra*).

As indicated earlier in this paragraph, section 16(2) requires that the offending expression should first of all carry a message of hatred where after it must be established whether the expression causes harm. If the broad conception of harm employed by the Canadian Supreme Court is sanctioned, whether pornography which carries a message of gender inferiority, dehumanisation and degradation causes psychological or emotional harm to women as a group must be assessed. In need not, to my mind, be argued that a response of humiliation and degradation (even anger) is to be expected from groups targeted by racist or sexist propaganda. South Africa's history of institutionalised oppression indeed underscores this argument.¹¹⁸ Like racist hate speech, images which purport to convey the sexual inferiority and degradation of women engender severe psychological consequences. And these are consequences that a nation and constitutional order that prides itself on non-racism, non-sexism and the fostering of human dignity through, among other things, an acknowledgement of equality between the sexes, cannot tolerate.

I see the requirement that the offensive expression must constitute incitement to cause harm as a lesser requirement than the one which calls for the establishment of a direct causal link between pornography and acts of (sexual) violence against women. I do not, therefore, interpret this as an instance where the speech in question must result in a particular violent incident, but rather that pornography as hate speech encourages gender-specific anti-social behaviour against women as a group.¹¹⁹ Therefore, the concrete requirement of section 16(2)(c) of the South African Constitution does not, to my mind, appear to insist on direct (factual) cause and effect, but would appear to be satisfied when the speech or mode of expression is situated - as my second proposed definition of pornography indicates - in a context which suggests endorsement or approval of sexually explicit gender-specific acts of degradation, humiliation or violence.

Although the South African Constitution contains a general limitation clause, section 16(2) does not (also) have to be justified as a reasonable limitation of the right to freedom of expression in terms of section 36.¹²⁰ As a so-called "internal modifier", section 16(2) is of equal (constitutional) status to the general limitation clause. In view of the fact that section 16(2) forms part of the definition of freedom of expression contained in section 16(1), the former justifies its own existence. Therefore, once hate speech has been defined, the right entrenched in terms of section 16(1) per definition becomes a right to freedom of expression *precluding* hate speech. It follows that, once it has been established that a particular category of pornographic material

¹¹⁸ See Chapter 6 of this dissertation par 6 6, especially par 6 6 4 and accompanying footnotes (*supra*).

¹¹⁹ See Chapter 6 of this dissertation par 6 6, especially par 6 6 4 and accompanying footnotes (*supra*).

¹²⁰ See Chapter 6 of this dissertation par 6 6, especially par 6 6 5 and accompanying footnotes (*supra*).

could be construed as the advocacy of (gender) hatred that constitutes incitement to cause harm, it is unnecessary to proceed with an assessment in terms of section 36 of the South African Constitution.¹²¹

77 SOME THOUGHTS ON THE REGULATION AND/OR PROHIBITION OF ADULT HETEROSEXUAL PORNOGRAPHY AS LEGAL AND POLITICAL STRATEGY

To my mind, the rationale established throughout the course of my quest for a suitable (legal) conception of adult heterosexual pornography, coupled with my assessment of the constitutional ramifications of pornography, points to only one logical conclusion, namely that pornography conceptualised as a patriarchal practice or a hateful mode of expression which impacts on the fundamental rights and freedoms of women cannot be tolerated in a society which prioritises the values of human dignity, equality and freedom. My assessment of pornography in relation to specific rights entrenched in the Bill of Rights in the South African Constitution has revealed that adult heterosexual pornography infringes the right to equality in that it constitutes unfair discrimination on the conceptually interrelated grounds of both gender and sex, that it constitutes a real threat to the right to freedom and security of the person, specifically in relation to the right not to be tortured, subject to cruel, inhuman or degrading treatment and the right to security in and control over one's body and that pornography falls foul of the specific constitutional prohibition on hate speech as it constitutes the advocacy of gender hatred and constitutes incitement to cause harm.

Apart from the two ordinances drafted by Andrea Dworkin and Catharine MacKinnon for the Cities of Minneapolis and Indianapolis, no other legislative effort to regulate and/or proscribe sexually explicit material so much as attempt to address the key issue of pornography. There exists a resounding silence on the power imbalance in society, male dominance, female subordination and sexual inequality. Neither the United States Federal Model Penal Code,¹²² the Canadian Criminal Code,¹²³ or the South African Films and Publications Act¹²⁴ define pornography, in the words of Catherine Itzin, "specifically for what it is and what it does to

¹²¹ See Chapter 6 of this dissertation par 6 6, especially par 6 6 5 and accompanying footnotes (*supra*).

¹²² The Model Penal Code 6 of 1957.

¹²³ Criminal Code RSC C-46 of 1985 (*supra*).

¹²⁴ Act 65 of 1996 (*supra*).

women."¹²⁵ With the recognition of the role that pornography plays in constructing powerful subject positions and maintaining sexual inequality, a unique opportunity exists to target pornography specifically on the grounds of the constitutionally accountable harm it causes to women. The rationale for the prohibition of pornography is thus situated in the human rights violations it engenders. In its systematic exploitation and subordination of women on the basis of sex, the dehumanization, degradation, inferiority, bigotry, contempt, aggression and violence it both embraces and maintains have definitive and real human rights consequences.

Yet even feminists have levelled a variety of criticisms against embarking on a legislative strategy against pornography.¹²⁶ As a bastion of male power, feminists have argued that the law and judicial system is unlikely to be sympathetic either to the claims of women or to facilitate sexual equality. Moreover, the point has been raised that even effective legislation will not serve to eliminate pornography or end violence against women. Sexual violence against women will prevail, as it always has, and efforts to suppress pornography will simply force it underground, like illegal drug trafficking or bootleg liquor in the United States during the prohibition in the early part of the twentieth century. The question thus arises: if legislation on its own can never secure gender equality, why argue then for the suppression of adult heterosexual pornography, conceptualised as a patriarchal practice, by means of a legislative strategy?

To my mind, the answer lies, in part, in the fact that a law which prohibits pornography on the basis of the harm caused to the constitutional interests of women will - at the very least - send out a strong message that the objectification of women in pornography, accompanied by the inequality, violence and denegration it embraces, is unacceptable in an open and democratic society founded on the values of equality, human dignity and freedom. Apart from the increased public awareness legislation of this nature will foster (which is, of course, in step with consciousness raising as feminist method), it will inevitably also play a role in establishing definitive social values, including the visible public statement that some practices are socially unacceptable and are thus not to be tolerated. The prohibition of murder, theft and robbery by no means eradicates these crimes from society, yet it is highly unlikely that this failure will be used as justification to lift the restriction on these long established crimes of common law.

¹²⁵ See "Legislating Against Pornography without Censorship" in C Itzin (ed) *Pornography* 401 at 415 (*supra*).

¹²⁶ The most notable of these are the views collected in G Chester and J Dickey (eds) *Feminism and Censorship: The Current Debate* (1988) (Dorset: Prism Press), V Burstyn (ed) *Women Against Censorship* (1985) (Vancouver: Douglas and McIntyre) and L Segal and M McIntosh (eds) *Sex Exposed, Sexuality and the Pornography Debate* (1992) (London: Virago Press). For a critical review of the latter two publications, see Susan Cole 1985 1(1) *Canadian Journal of Women and the Law* 226 - 239 and Jo Bridgeman 1993 1(1) *Feminist Legal Studies* 105 - 109.

Indeed, the South African experience has shown that the more rampant violent crime becomes, the stronger the public outcry for tough punitive measures, even culminating in calls for the reinstatement of the death penalty. Senior members of government have likewise called on South African courts to impose the heaviest possible sentences on perpetrators of violent sexual crimes against women and children.¹²⁷ Laws enacted against murder, rape, race or sex discrimination have a value in setting goals and standards of behaviour in society which speak against abusive acts that violate the dignity and physical integrity of (vulnerable and marginalised) humans. I agree with Carol Smart who argues that the value of legislation (whether of a criminal or civil nature) lies not so much in its implementation and enforcement as in its wider symbolic value. Accordingly, legislation

“would enable women to shift the debate away from the terrain of sex and sexual prudery, towards that of discrimination. It would open up the issue for wider debate because new positions become available and stereotyped positions could be avoided.”¹²⁸

But while legislation against adult heterosexual pornography might have symbolic value for some, for the women who are effectively silenced in the absence of such legislation it would expose the constitutional injury caused by pornography. I agree that legislation against pornography could not guarantee the elimination of sexism and sexual violence any more than the abolition of slavery and apartheid ended racism and racially related acts of violence. But slavery - once, as pornography is now, a major international profit-making industry - and apartheid have rightly been declared crimes against humanity. And with the prohibition of racial segregation and institutionalised oppression came a marked decrease in racist practices and racial violence. To my mind, legislation could likewise be used with significant effect to address the abuse of women through - and the practice of sex discrimination engendered by - adult heterosexual pornography. Legislative remedies are never intended to be the sole solution to endemic social problems, for these must be accompanied by corresponding changes in perceptions and values. By addressing the human rights abuses engendered by pornography through legislative means, a new legal and political standard for the treatment of women (as a historically marginalised and vulnerable group) could, however, be established. Indeed, the civil rights route embarked on by Dworkin and MacKinnon sought to achieve this very purpose. As Dworkin so strikingly encapsulates,

¹²⁷ Deputy President Jacob Zuma was quoted in the media to have called for tough measures against perpetrators of violent sexual crimes against women and children at a conference on sex and violent crime held in Cape Town in September 1999: see “Misdadigers teen vroue, kinders ‘moet swaarste strawwe kry’” *Die Burger* September 29, 1999.

¹²⁸ See “Theory into Practice: The Problem of Pornography” in *Feminism and the Power of Law* (1989) at 133.

"[t]he civil rights law introduces into the public consciousness and analysis: of what pornography is, what sexual subordination is, what equality might be. The civil rights law introduces a new legal standard. *These things are not done to citizens of this country.* The civil rights law introduces a new political standard: *these things are not done to human beings.* The civil rights law provides a new mode of action for women through which we can pursue equality and because of which our speech will have social meaning. The civil rights law gives us back what the pornographers have taken from us: hope rooted in real possibility."¹²⁹

A law which affords women the right to lay criminal charges against a violent and abusive partner may not in itself translate into a victory for women. Such a law will not be sufficient to protect women against violence, bearing in mind also that the law will have to be enforced by a police force which forms an intricate part of a culture where female sexuality and domination are inextricably linked. As Annie Blue rightly points out,

"[m]ale dominance and control have engineered a culture which has evolved around male ideas, attitudes and experiences, attaching significance and importance to male existence and marginalising women's existence. In 'our' male-centred culture, women have been assigned to the status of supporters, standing on the sidelines of a global sports field where men are the designers of the game, the rule-makers, tacticians, managers, players, referees, profit-makers, decision-makers; it is without exception a man's game."¹³⁰

However, if a law which seeks to address violence against women is passed in the context of women's struggle for social and political liberation, such a law would serve to make violence against women more visible and increase the accountability of law enforcement agencies. It may possibly even translate into safe houses for battered women and serve to improve women's educational and employment prospects. By fashioning a law around women's specific needs and actual socio-political conditions, the danger of the law being used to further male ideas and interests is significantly reduced. Under these conditions, legislative measures which provide for criminal charges against an abusive partner or which seek to proscribe a practice of sex discrimination can indeed present a significant victory for women in their struggle for legal and political advancement. And this is precisely the reason why a discourse about censorship in relation to pornography must be situated within the politics of gender relations.

State control (or censorship) of sexually explicit material can take either of two forms - direct control by criminal law and administrative control backed up by criminal law.¹³¹ An

¹²⁹ In P Smith (ed) *Pornography* (1992) 449 at 462 (*supra*). See also 8 *Harvard Women's Law Journal* 1 at 24 (*supra*). My emphasis.

¹³⁰ Annie Blue "Censorship - An Analysis" in G Chester and J Dickey (eds) *Feminism and Censorship: The Current Debate* (1988) 105 at 107.

¹³¹ See, in general, Kobus van Rooyen "Censorship" in Joubert (ed) *LAWSA* Volume 2, "Censorship in a Future South Africa: A Legal Perspective" 1993 26 *De Jure* 283, Johan van der Vyver "Censorship in South Africa by JCW van Rooyen" 1988 2 *De Jure* 182 and Gilbert Marcus "The Wider Reaches of

administrative system targets the material in question and has two main functions. First, it is concerned with the direct and immediate banning of material and, secondly, it sets out a system for the classification of material. A system of administrative control is therefore closely related to issues of administrative justice which will be guided by the requirements of natural justice contained in section 33 of the South African Constitution. A criminal law system, on the other hand, targets the person and is therefore aimed at holding specific perpetrators accountable. Such a system of control serves as a deterrent and is by nature a slower process than an administrative one. One could argue that, as a matter of principle, criminal law is preferable. Since an administrative board is usually appointed by the executive of government on certain conditions (such as that its members are remunerated per case and are to be re-appointed after a specified number of years),¹³² the structure's independence may well be compromised. However, in the light of the specific challenges faced by the South African criminal justice system, notably a critical shortage of qualified staff and lack of resources, a system of control which relies exclusively on criminal law will be hard pressed to formulate an effective response to the constitutionally accountable harms of pornography. A system which combines criminal and administrative control would therefore appear to be better suited to respond to the particular human rights challenges posed by adult heterosexual pornography. This begs the question whether time and place restrictions on pornography - which turn on the idea of adult premises (an idea which has been incorporated by the Films and Publications Act) - have the potential to adequately respond to the specific constitutional challenges posed by pornography.

I do not, in principle, support time, place and age restrictions as suitable responses to adult heterosexual pornography. Since restrictions of this nature fail to appreciate the impact which pornography has on women's constitutional interests in human dignity, equality and physical integrity, such a strategy is ill suited to provide an understanding of the nature and causes of the specific human rights infringements engendered by adult heterosexual pornography. To my mind, a call for time, place and age restrictions merely seeks to protect the (questionably fragile) sensibilities of adults who do not wish to be confronted by pornography or its harm, minors and residential and upmarket retail property values. While restrictions of such a nature completely misconstrue the harm of pornography, they also blatantly suggest - and effectively propagate the hypocrisy - that serious violations of the rights and freedoms of women are quite acceptable under specific controlled or restrictive conditions. The idea that pornography and its harms are to be treated as unavoidable consequences of a free and open society flies in the face of our

Censorship" 1985 1 *SAJHR* 69.

¹³² The conditions under which members of the Film and Publication Board and the Film and Publication Review Board are appointed are set out in Chapter 2, sections 2 - 15 of Act 65 of 1996 (*supra*). For a discussion of these conditions, see Chapter 5 of this dissertation par 5 3 1 and accompanying footnotes (*supra*).

constitutional commitment to human dignity, equality and security of the person. To my mind, a regulative plan of action which proceeds from the assumption that pornography is but a public nuisance¹³³ which can adequately be addressed by means of zoning laws is ill equipped to provide a comprehensive strategy that can respond to the systematic exploitation and subordination of women on the basis of their sex and the dehumanization, degradation, inferiority, intolerance and aggression which pornography both embraces and perpetuates.

In light of these particular challenges and the rationale established throughout the course of this study, I accordingly recommend that control of adult heterosexual pornography, defined as a patriarchal practice, be facilitated through a system of administrative control, coupled with appropriate criminal sanctions. This means that I am, in principle, in favour of the proscriptive legislative path embarked on by the Films and Publications Act, bar for the fact that such a legislative strategy needs to embrace a more comprehensive and accurate conception of adult heterosexual pornography and its harm.¹³⁴ Apart from hate speech¹³⁵ and child pornography,¹³⁶ the Films and Publications Act at present only proscribes "explicit violent sexual conduct",¹³⁷ "explicit sexual conduct which degrades a person *and* which constitutes incitement to cause harm"¹³⁸ and "the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm".¹³⁹ The legislative strategy which I propose would therefore not seek to target sexually explicit images *per se*, but the production and dissemination of sexually explicit words or images which correspond with the definition of adult heterosexual pornography which I formulated in Chapter 5 of this dissertation.¹⁴⁰ Accordingly, an administrative-cum-criminal

¹³³ The notion of obscenity as a public nuisance has been embraced in United States criminal law with questionable success: see, in general, Steven Catlett "Enjoying Obscenity as a Public Nuisance and the Prior Restraint Doctrine" 1984 84(5 - 8) *Columbia Law Review* 1616.

¹³⁴ Once the harm of pornography is suitably articulated, this could in fact broaden attempts at regulation with a view to not only secure the constitutional interests of women, but also those of other historically marginalised, oppressed or vulnerable groups or categories of persons, notably gays, lesbians and transsexuals. See also par 7 2 5 n 95 (*supra*).

¹³⁵ See section 29 of Act 65 of 1996 (*supra*).

¹³⁶ See sections 26, 27 and 28 as well as Schedules 1(1)(a) and 6(1)(a) of Act 65 of 1996 (*supra*).

¹³⁷ See Schedule 1(1)(b) and Schedule 6(1)(b) of Act 65 of 1996 (*supra*).

¹³⁸ See Schedule 1(1)(d) and Schedule 6(1)(d) of Act 65 of 1996 (*supra*).

¹³⁹ See Schedule 1(1)(e) and Schedule 6(1)(e) of Act 65 of 1996 (*supra*).

¹⁴⁰ See Chapter 5 of this dissertation par 5 5, especially par 5 5 1 - 5 5 2 and accompanying footnotes (*supra*).

legislative strategy against adult heterosexual pornography must proceed from a conception of pornography as the sexually explicit representations of women within a context of unequal gender power relations, subordination, objectification, degradation, dehumanisation or sexualised violence, including rape, abuse, torture, brutality, coercion, injury, mutilation and which suggests endorsement or approval of such behaviour or acts. Although largely a matter for the attention of bureaucratic experts, criminal sanction could possibly take the form of a fine or imprisonment for a suitable period or both such a fine and imprisonment. The sentences prescribed by the Films and Publications Act for periods of between six months¹⁴¹ and five years¹⁴² may well prove to be appropriate under the circumstances.

7 8 CONCLUDING OBSERVATIONS

The need to articulate a suitable legislative response to the particular and serious human rights consequences of adult heterosexual pornography cannot be denied. Inaction on the part of the state will be incompatible with a legal and constitutional order which emphasises human dignity and equality and recognises the legal duty to respect, protect, promote and fulfil these particular constitutional interests. Or as Elizabeth Wolgast so eloquently argues,

“there is no ‘neutral’ and safe response against pornography’s demeaning of women. The issue demands to be addressed by a government that wants not to give sanction to the message carried by the images. A state that wants to ensure an atmosphere of respect for all persons has to face the issue in more decisive terms.”¹⁴³

But a conception of pornography as a mode of expression will be hard pressed to make sense of the gender-specific objectification that stands central to all heterosexual pornography and the degradation it engenders. This is strikingly illustrated by the difficulty experienced by Johan de Waal, Ian Currie and Gerhard Erasmus who acknowledge that a definition of pornography as a form of expression which is, objectively speaking, degrading to women may be susceptible to challenge on the basis that it results in arbitrary treatment of some forms of expression.¹⁴⁴ On this basis, it then becomes difficult to argue for the prohibition of pornography but not other forms of expression such as beauty contests or, in the words of the authors, “the use of scantily-clad women” to advertise consumer products which may also be viewed as degrading to women. It follows, therefore, that one will not be able to formulate a persuasive (constitutional) argument

¹⁴¹ See section 30(3) of Act 65 of 1996 (*supra*).

¹⁴² See section 30(1) of Act 65 of 1996 (*supra*).

¹⁴³ See “Pornography and the Tyranny of the Majority” in P Smith (ed) *Feminist Jurisprudence* 431 at 441 (*supra*).

¹⁴⁴ See “Expression” in J de Waal et al *The Bill of Rights Handbook* (2000) 281 at 294.

to the effect that the prohibition of pornography will lead to the legal and political advancement of women, for this will surely also be the object of a strategy which seeks to prohibit beauty contests or advertisements which carry a sexist message. The line of reasoning employed by the authors illustrates the fundamental dilemma of opting to conceptualise adult heterosexual pornography as a mode of expression. To my mind, one will never be able to formulate a compelling (constitutional) argument against pornography on the basis that it objectifies or degrades women if pornography is examined under the rubric of free speech. Only radical feminist thought has the potential to transcend this dilemma, for only a radical feminist conception of pornography can facilitate a convincing argument for the legal prohibition of pornography on the basis of the constitutionally accountable harm pornography engenders rather than on the basis of the moralistic sensibilities that pornography may (or may not) affront.

What is not, therefore, called for is a moralistic or puritanical condemnation of adult heterosexual pornography, but a rationale constructed around the constitutionally accountable harm of pornography instead. Only a gender-specific human rights rationale has the potential to transcend the shortcomings associated with traditional attempts to proscribe sexually explicit material. There is no doubt in my mind that it is near impossible to regulate a phenomenon which is construed as morally offensive, for the simple reason that such a subjective notion or understanding is incapable of functioning as an objective constitutional standard. The difficulties experienced in the United States by judges and prosecutors alike in their attempt to attribute legal meaning to the Supreme Court's obscenity standard underscores my point.¹⁴⁵ But once the matter is re-conceptualised as a human rights issue which proceeds from the actual socio-political conditions of women as a (historically) marginalised and vulnerable group, there can, to my mind, be no other (logical) conclusion than that legislative measures which seek to prohibit adult heterosexual pornography are both reasonable and justifiable in a open and democratic society based on the core values of human dignity, equality and freedom.

¹⁴⁵

For an excellent account of the difficulties experienced by judges and prosecutors in the United States, see Harold Leventhal (former United States Circuit Judge for the District of Columbia) "The 1973 Round of Obscenity-Pornography Decisions" 1973 59 *ABAJ* 1261 at 1266 and "An Empirical Inquiry into the Effects of *Miller v California* on the Control of Obscenity" 1977 52(4 - 6) *New York University Law Review* 810 at 817.

SELECTED BIBLIOGRAPHY

BOOKS

- Abel E and Abel E (eds) *The Signs Reader* (1983) (Chicago: Chicago University Press)
- Antony L and Witt C (eds) *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (1993) (Boulder: Westview Press Inc)
- Arcond B *The Jaguar and the Anteater: Pornography Degree Zero* (1993) (translated 1st ed 1991) (London: Verso)
- Arthur J and Shaw WH (eds) *Readings in the Philosophy of Law* (1984) (2nd ed) (New Jersey: Prentice Hall)
- Assiter A and Carol A (eds) *Bad Girls and Dirty Pictures: The Challenge to Reclaim Feminism* (1993) (London: Pluto Press)
- Bacchi C *Same Difference: Feminism and Sexual Difference* (1990) (London: Allen and Unwin)
- Bartlett KT *Gender and Law: Theory, Doctrine, Commentary* (1993) (Boston: Little, Brown & Company) (Law School Casebook Series)
- Bartlett KT and Kennedy R (eds) *Feminist Legal Theory: Readings in Law and Gender* (1991) (Boston: Little, Brown & Company)
- Bazilli S (ed) *Putting Women on the Agenda* (1991)
- Beatty DM *Constitutional Law in Theory and Practice* (1995) (Toronto: University of Toronto Press)
- Beaudoin G and Mendes E (eds) *The Canadian Charter of Rights and Freedoms* (1996) (Toronto: Carswell Publishing)
- Becker, Bowman and Torrey *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* (1992) (Minnesouta: West Publishing)
- Berlin ML and Pentney WF *Human Rights and Freedoms in Canada: Cases, Notes and Materials* (1987) (Toronto: Butterworths)
- Berns W *The First Amendment and the Future of American Democracy* (1976) (Basic Books Inc Publishers)
- Bock G and James S (eds) *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (1992) (London: Routledge)
- Böckenförde E-W *State, Society and Liberty* (1991) (St Martin's Press)
- Bollinger N *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986) (New York: Oxford University Press)
- Bowles G and Klein RD *Theories of Women's Studies* (1983) (London: Routledge & Kegan Paul)
- Boyle CLM et al (eds) *Charterwarch: Reflections on Equality* (1986) (Toronto: Carswell)
- Brod H and Kaufman M (eds) *Theorizing Masculinities* (1994) (California: Sage Publications)
- Brodie J *Women and Canadian Public Policy* (1996) (Toronto: Harcourt Brace & Co)
- Brodsky D and Day S *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (1989) (Ottawa: Canadian Advisory Council on the Status of Women)
- Brownmiller S (ed) *Against Our Will: Men, Women and Rape* (1976) (New York: Bantam)
- Bryner GC and Thompson DL (eds) *The Constituion and the Regulation of Society* (1988) (Utah: Brigham Young University)
- Bryson V *Feminist Political Theory: An Introduction* (1992) (reprinted 1993, 1994) (London: The MacMillan Press Ltd)
- Burstyn V (ed) *Women Against Censorship* (1985) (Vancouver: Douglas and McIntyre)
- Butler J and Scott JW (eds) *Feminists Theorize the Political* (1992) (New York: Routledge, Chapman & Hall Inc)

- Cachalia A et al *Fundamental Rights in the New Constitution* (1994) (Cape Town: Juta & Co Ltd)
- Chaskalson M et al *Constitutional Law of South Africa* (1998) (Kenwyn: Juta & Co Ltd)
- Chester G and Dickey J (eds) *Feminism and Censorship: The Current Debate* (1988) (Dorset: Prism Press)
- Cliteur PB *Inleiding in het Recht* (1992) (Amsterdam: Wolters-Noordhoff)
- Cole SG *Pornography and the Sex Crisis* (1989) (Toronto: Amanita Publications)
- Coole D *Women in Political Theory* (1988) (Brighton: Wheatsheaf)
- Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) (Philadelphia: University of Pennsylvania Press)
- Copp D and Wendell S (eds) *Pornography and Censorship* (1983) (Buffalo: Prometheus Books)
- Corder H (ed) *Essay on Law and Social Practice in South Africa* (1988) (Durban: Butterworths)
- Cornell D *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (1991) (New York: Routledge)
- Cornell D *Transformations: Recollective Imagination and Sexual Difference* (1993) (London: Routledge)
- Cossmann B et al *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (1997) (Toronto: University of Toronto Press)
- Cott N *The Grounding of Modern Feminism* (1987) (New Haven: Yale University Press)
- Daly M *Beyond God the Father: Towards a Philosophy of Women's Liberation* (1973) (Boston: Beacon Press)
- Daly M *Gyn/Ecology: The Metaethics of Radical Feminism* (1978) (Boston: Beacon Press)
- Davis D et al *Fundamental Rights in the Constitution: Commentary and Cases* (1994) (Johannesburg: Juta & Co Ltd) (Centre for Applied Legal Studies Wits University)
- De Beauvoir S *The Second Sex* (1949) (reprinted 1972) (Harmondsworth: Penguin)
- De Grazia E *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (1992) (New York: Random House)
- De Waal J et al *The Bill of Rights Handbook 2000* (2000) (Cape Town: Juta & Co Ltd)
- Dugard J *Human Rights and the New South African Legal Order* (1978) (Cape Town: Juta & Co Ltd)
- Dworkin A *Women Hating* (1974) (New York: EP Dutton)
- Dworkin A *Our Blood: Prophecies and Discourses on Sexual Politics* (1976) (1982 edition) (New York: Harper & Row)
- Dworkin A *Pornography: Men Possessing Women* (1981) (New York: Perigree)
- Dworkin A *Right-Wing Women: The Politics of Domesticated Females* (1983) (New York: Perigree)
- Dworkin A *Intercourse* (1987) (New York: Free Press)
- Dworkin A *Letters from a War Zone* (1988) (London: Secker and Warburg)
- Dworkin A and MacKinnon CA *Pornography and Civil Rights: A New Day for Women's Equality* (1988) (Minneapolis MN: Organizing Against Pornography)
- Dworkin R *Taking Rights Seriously* (1977) (Cambridge: Harvard University Press)
- Dworkin R *A Matter of Principle* (1985) (Cambridge: Harvard University Press)
- Duncan J (ed) *Between Speech and Silence: Hate Speech, Pornography and the new South Africa* (1996) (Johannesburg: Joint Publication of The Freedom of Expression Institute and The Institute for Democracy in South Africa)
- Eisenstein Z *The Radical Future of Liberal Feminism* (1981) (New York: Longman)
- Eisenstein Z *Feminism and Sexual Equality* (1984) (New York: Monthly Review Press)
- Elam D *Feminism and Deconstruction* (1994) (London: Routledge)
- Eston SM *The Problem of Pornography: Regulation and the Right to Free Speech* (1994) (London: Routledge)
- Evans M (ed) *The Woman Question: Readings on the Subordination of Women* (1982) (London: Fontana)

- Firestone S *The Dialectic of Sex* (1970) (London: Women's Press)
- Fish S *There's No Such Thing as Free Speech* (1994) (New York: Oxford University Press)
- Frazer E et al *Ethics: A Feminist Reader* (1992) (Oxford: Blackwell Publishers)
- French SG et al *Violence Against Women: Philosophical Perspectives* (1998) (London: Cornell University Press)
- Geldenhuys PB *Pornografie, Sensuur en Reg* (1977) (Johannesburg: Lex Patria Uitgewery)
- Gibson P and Gibson R (eds) *Dirty Looks: Women, Pornography, Power* (1993) (London: BFI Publishing)
- Gilligan C *In a Different Voice: Psychological Theory and Women's Development* (1982) (Cambridge: Harvard University Press)
- Griffin S *Pornography and Silence: Culture's Revenge Against Nature* (1981) (New York: Harper & Row Publishers)
- Gubar S and Hoff J (eds) *For Adult Users Only: The Dilemma of Violent Pornography* (1989) (Bloomington: Indiana University Press)
- Hamilton R *The Liberation of Women: A Study of Patriarchy and Capitalism* (1978) (London: George Allen & Unwin Publishers Ltd)
- Hampshire S (ed) *Public and Private Morality* (1978) (Cambridge: Cambridge University Press)
- Harris et al *Law of the European Convention on Human Rights* (1995) (London: Butterworths)
- Hawkins G and Zimring FE 1988 *Pornography in a Free Society* (1988) (Cambridge: Cambridge University Press)
- Heyman S (ed) *Hate Speech and the Constitution* (1996) (Toronto: Garland)
- Hobbes T *Leviathan* (1968) (New York: Penguin Books)
- Hogg PW *Constitutional Law of Canada* (1996) (4th ed) (Carswell Thompson Professional Publishing)
- Hosten WJ et al *Introduction to South African Law and Legal Theory* (1997) (Durban: Butterworths)
- Hughes DA (ed) *Perspectives on Pornography* (1970) (New York: St Martin's Press)
- Hunt L (ed) *The Invention of Pornography: Obscenity and the Origins of Pornography 1500 - 1800* (1993) (New York: Zone Books)
- Husserl E *Ideas: General Introduction to Pure Phenomenology* (1913) (1931 translation by WR Boyce Gibson) (New York: MacMillan)
- Husserl E *The Crisis of European Sciences and Transcendental Phenomenology* (1970) (translation by D Carr) (Evanston: Northwestern University Press)
- Itzin C (ed) *Pornography: Women, Violence and Civil Liberties* (1992) (New York: Oxford University Press Oxford)
- Jaggar AM *Feminist Politics and Human Nature* (1983) (reprinted 1988) (Rowman & Littlefield Publishers Inc)
- Jaggar AM and Rothenberg PS *Feminist Frameworks: Alternative Accounts of the Relations between Women and Men* (1993) (Boston: McGraw Hill)
- Jagwanth S et al *Women and the Law* (1994) (Pretoria: HSRC Publishers)
- Jeffries S *Anticlimax* (1990) (London: Women's Press)
- Jones K and Jonasdottir A (eds) *The Political Interests of Gender: Developing Theory and Research with a Human Face* (1988) (London: Sage)
- Kaplan G *Contemporary Western European Feminism* (1992) (London: Allen & Unwin UCL Press Ltd)
- Kappeler S *The Pornography of Representation* (1986) (Minneapolis: University of Minnesota Press)
- Kelly L and Weisburg (eds) *Feminist Legal Theory Foundations* (1989) (London: Hamish Hamilton)
- Kemp S and Squires J (eds) *Feminisms* (1997) (Oxford: Oxford University Press)

- Kendrick W *The Secret Museum: Pornography in Modern Culture* (1987) (New York: Viking Press)
- Kendrigan ML (ed) *Gender Differences: Their Impact on Public Policy* (1991) (New York: Greenwood Press)
- Knopf *The Constitutional Drama* (1993) (Harper Collins Publishers)
- Koedt A et al *Radical Feminism* (1973) (New York: Quadrangle Books)
- Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) (2nd ed) (London: Duke University Press)
- Krichmar A (ed) *The Women's Movement in the Seventies: An International English-Language Bibliography* (1977) (New York: The Scarecrow Press Inc Methuchen)
- Lacombe D *Blue Politics: Pornography and the Law in the Age of Feminism* (1994) (Toronto: University of Toronto Press)
- Laslett P (ed) *Two Treatise of Government* (1960) (Cambridge: Cambridge University Press)
- Lederer L (ed) *Take Back the Night: Women on Pornography* (1982) (New York: William Morrow and Co Inc)
- Lederer L and Delgado (eds) *The Price We Pay - The Case Against Racist Speech, Hate Propaganda and Pornography* (1995) (New York: William Morrow and Co Inc)
- Leidholt D and Raymond J (eds) *The Sexual Liberals and the Attack on Feminism* (1990) (New York: Pergamon Press)
- Liebenberg S (ed) *The Constitution of South Africa from a Gender Perspective* (1995) (The Community Law Centre University of the Western Cape Bellville SA) (in association with David Philip Publishers Claremont Cape Town)
- Lloyd G *The Man of Reason: "Male" and "Female" in Western Philosophy* (1984) (London: Methuen)
- Locke J *The Second Treatise of Government* (1960) (Cambridge: Cambridge University Press)
- Lovelace L and McGrady M *Ordeal* (1990) (Seracus New Jersey: Citadel Press)
- Lowman J et al *Regulating Sex* (1986) (Toronto: Carswell Publishing)
- MacKinnon CA *Sexual Harassment of Working Women* (1979) (New Haven: Yale University Press)
- MacKinnon CA *Feminism Unmodified: Discourses on Life and Law* (1987) (Cambridge: Harvard University Press)
- MacKinnon CA *Toward a Feminist Theory of the State* (1989) (reprinted 1991) (Cambridge: Harvard University Press)
- MacKinnon CA and Dworkin A (eds) *In Harms Way: The Pornography Civil Rights Hearings* (1997) (Cambridge: Harvard University Press)
- MacKinnon CA *Only Words* (1993) (Cambridge: Harvard University Press)
- Malamuth NM and Donnerstein E (eds) *Pornography and Sexual Aggression* (1984) (London: Women's Press)
- Marcus G *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (1986)
- Mathews AS *Law, Order and Liberty in South Africa* (1971) (Durban: Butterworths)
- Matsuda M et al *Words that Wound* (1993) (London: Virago Press Ltd)
- McBride-Stetson D *Women's Rights in the USA: Policy Debates and Gender Roles* (1991)
- McDowell L and Pringle R 1992 *Defining Women: Social Institutions and Gender Divisions* (1992) (Cornwall: Polity Press)
- McKeacher W (ed) *The United States Bill of Rights and the Canadian Charter of Rights* (1983) (Toronto: Carswell Publishing)
- McNay L *Foucault and Feminism: Power, Gender and the Self* (1992) (Cambridge: Polity Press)
- Meehan E and Sevenhuijsen S (eds) *Equality Principles and Politics* (1991) (London: Sage)
- Meehan E et al *Canadian Charter of Rights and Freedoms* (1996) (Toronto: Carswell Publishing)
- Melden A *Rights and Persons* (1977) (Oxford: Basil Blackwell)
- Meyer M and Parent W (eds) *The Constitution of Rights: Human Dignity and American Values* (1992) (Ithaca: Cornell University Press)
- Meyerson D *Rights Limited* (1997) (Kenwyn: Juta & Co Ltd)

- Millett K *Sexual Politics* (1970) (1985 edition) (London: Virago Press Ltd)
- Myers KA et al *Feminist Foundations: Toward Transforming Sociology* (1998) (London: SADE Publications)
- Moraga C and Azaldua *This Bridge Called My Back: Writings by Radical Women of Colour* (1983) (New York: Kitchen Table: Women of Color Press)
- Murphy WF et al *American Constitutional Interpretation* (1995) (2nd ed) (New York: The Foundation Press Inc)
- Murray C (ed) *Gender and the New South African Legal Order* (1994) (Cape Town: Juta & Co Ltd) (published under the auspices of the Faculty of Law, University of Cape Town)
- Nagel T *Partiality and Equality* (1991) (Princeton: Princeton University Press)
- Nozick R *Anarchy, State and Utopia* (1974) (Cambridge: Harvard University Press)
- Okin SM *Women in Western Political Thought* (1979) (Princeton: Princeton University Press)
- Pateman C *The Sexual Contract* (1988) (Cambridge: Polity Press)
- Pateman C and Gross E (eds) *Feminist Challenges: Social and Political Theory* (1986) (London: Allen and Unwin)
- Phillips A (ed) *Feminism and Equality* (1987) (Oxford: Basil Blackwell)
- Posner RA *Sex and Reason* (1992) (Cambridge: Harvard University Press)
- Potter H *Pornography: Group Pressures and Individual Rights* (1996) (Sydney: The Federation Press Pty Ltd)
- Rautenbach IM *General Provisions of the South African Bill of Rights* (1995) (Durban: Butterworths)
- Rawls J *A Theory of Justice* (1971) (Cambridge: Harvard University Press)
- Raz J *The Morality of Freedom* (1986) (Oxford: Clarendon Press)
- Russell DEH *Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment* (1984) (Berkeley: Russell Publications)
- Russell DEH *Against Pornography: The Evidence of Harm* (1993) (Berkeley: Russell Publications)
- Sassoon AS (ed) *Women and the State: The Shifting Boundaries Between Public and Private* (1987) (London: Hutchinson)
- Saunders KW *Violence as Obscenity: Limiting the Media's First Amendment Protection* (1996) (London: Duke University Press)
- Scheiderman D (ed) *Freedom of Expression and the Charter* (1991) (Toronto: Thomson Professional Publishing)
- Segal L *Is the Future Male? Troubled Thoughts on Contemporary Feminism* (1987) (London: Virago Press Ltd)
- Segal L and McIntosh M (eds) *Sex Exposed: Sexuality and the Pornography Debate* (1992) (London: Virago Press Ltd)
- Sellen BC and Young PA (eds) *Feminists, Pornography & the Law: An Annotated Bibliography of Conflict 1970 - 1986* (1987) (Connecticut: Library Professional Publications)
- Smart C *Feminism and the Power of Law* (1989) (London: Routledge)
- Smith P (ed) *Feminist Jurisprudence* (1993) (New York: Oxford University Press)
- St John-Stewas N *Obscenity and the Law* (1956) (London: Secker & Warburg)
- Steinem G *Outrageous Acts and Everyday Rebellions* (1983) (New York: Holt, Rinehart & Winston)
- Strossen N *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (1996) (2nd ed) (London: Imprint)
- Sunstein CR (ed) *Feminism and Political Theory* (1990) (Chicago: University of Chicago Press)
- Tanner L (ed) *Voices from Women's Liberation* (1970) (New York: Mentor)
- Tribe LH *American Constitutional Law* (1988) (Cambridge: Harvard University Press)
- Tribe LH and Dorf MC *On Reading the Constitution* (1991) (Cambridge: Harvard University Press)

- Van Blerk AE *Jurisprudence: An Introduction* (1996) (Durban: Butterworths)
- Vance CS (ed) *Pleasure and Danger: Exploring Female Sexuality* (1992) (2nd ed) (London: Pandora Press)
- Van Eikema Hommes HJ *Major Trends in the History of Legal Philosophy* (1979) (Amsterdam: North Holland Publishing Company)
- Van Hansen K and Philipson IJ (eds) *Women, Class and the Feminist Imagination: A Socialist-Feminist Reader* (1990) (Philadelphia: Temple University Press)
- Van Wyk D et al *Rights and Constitutionalism: The New South African Legal Order* (1994) (Cape Town: Juta & Co Ltd)
- Vetterlig-Broggin et al *Feminism and Philosophy* (1977) (Littlefield, Adams & Co)
- Voet J *Commentarius ad Pandectas* (1698) (unknown)

- Walker S *Hate Speech: The History of an American Controversy* (1994) (Nebraska: University of Nebraska Press)
- Williams L *Hard Core: Power, Pleasure, and the "Frenzy of the Visible"* (1989) (Berkeley: University of California Press)
- Wittgenstein L *Philosophical Investigations* (1958) (3rd ed) (translation by G Anscombe)
- Wolgast E *Equality and the Rights of Women* (1980) (London: Cornell University Press)
- Wollstonecraft M *Vindication of the Rights of Women* (1792) (reprinted 1978) (Harmondsworth: Penguin)

- Zillman (ed) *Pornography: Recent Research, Interpretations and Policy Considerations* (1989)

PERIODICALS

- Acheampong KA "The Ramifications of Lesotho's Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women" 1993 9(1) *Lesotho LJ* 79
- Albertyn C and Kentridge J "Introducing the Right to Equality in the Interim Constitution" 1994 10 *SAJHR* 147
- Albertyn C and Goldblatt B "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 *SAJHR* 248
- Ashley BP and Ashley D "Sex as Violence: The Body Against Intimacy" 1984 7 *International Journal of Women's Studies* 352
- Backhouse C "Diana EH Russell *Against Pornography: The Evidence of Harm*" (Book Review) 1996 11(1) *Canadian Journal of Law and Society* 277
- Baker CE "Scope of the First Amendment Freedom of Speech" 1978 25 *University of California Los Angeles Law Review* 964
- Baker CE "The Process of Change and the Liberty Theory of the First Amendment" 1982 55 *Southern California Law Review* 293
- Baldwin MA "The Sexuality of Inequality: The Minneapolis Pornography Ordinance" 1984 2 *Law and Inequality: Journal of Theory and Practice* 629
- Baldwin MA "Pornography: More Than a Fantasy" March - April 1984 *The Hennepin Lawyer* 8
- Baldwin MA "Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et al, Amici Curiae in Support of Defendant and Intervenor-Defendants, *Village Books v City of Bellingham*" 1989 1(1) *Yale Journal of Law and Feminism* 111
- Bartlett KT "Gender Law" 1994 1 *Duke Journal of Gender Law & Policy* 1
- Bartlett KT "Feminist Legal Methods" 1990 103(4) *Harvard Law Review* 829
- Beatty DM "A Constitutional Bill of Rights - The Canadian Experience" 1997 60(4) *The Modern Law Review* 481
- Beatty DM "The Canadian Conception of Equality" 1996 46 *University of Toronto Law Journal* 349

- Beatty DM "The Canadian Conception of Discrimination" 1996 4 *Canadian Labour and Employment Law Journal* 263
- Bender L "A Lawyer's Primer on Feminist Theory and Tort" 1988 30 *Journal of Legal Education* 3
- Böckenförde E-W "Die Methoden der Verfassungsinterpretation - Bestandsaufnahme und Kritik" 1976 29 *Neue Juristische Wochenschrift* 2089
- Bridgeman J "Book Review of L Segal and M McIntosh (eds) *Sex Exposed, Sexuality and the Pornography Debate*" 1993 1(1) *Feminist Legal Studies* 105
- Buchanan AE "Assessing the Communitarian Critique of Liberalism" 1988 - 1989 99 *Ethics* 852
- Burgess A, Hartman C, McCausland M and Powers P "Response Patterns in Children and Adolescents Exploited through Sex Rings and Pornography" 1984 141 *American Journal of Psychiatry* 656
- Byrnes AC "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women" 1989 14(1) *Yale Journal of International Law* 1
- Cahn NR "A Preliminary Feminist Critique of Legal Ethics" 1990 - 1991 4 *Georgetown Journal of Legal Ethics* 23
- Catlett ST "Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine" 1984 84(5 - 8) *Columbia Law Review* 1616
- Check J and Malamuth N "Pornography and Sexual Aggression: A Social Learning Theory Analysis" 1986 9 *Communicator Year Book* 74
- Childress SA "Reel 'Rape Speech': Violent Pornography and the Politics of Harm" 1991 25 *Law and Society Review* 177
- Cockrell A "No Platform for Racists: Some Dogmatism Regarding the Limit of Tolerance" 1991 7 *SAJHR* 339
- Cockrell A "Rainbow Jurisprudence" 1996 12 *SAJHR* 1
- Cockrell A "The South African Bill of Rights and the 'Duck/Rabbit'" 1997 60(4) *The Modern Law Review* 513
- Cole SG "Book Review on 1985 *Women Against Censorship* by V Burstyn (ed) Douglas and McIntyre" 1985 1(1) *Canadian Journal of Women and the Law (CJWL)* 226
- Coliver S (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (1992)
- Colker R "Pornography and Privacy: Towards the Development of a Group-Based Theory for Sex-Based Intrusions of Privacy" 1983 1 *Law and Inequality: A Journal of Theory and Practice* 191
- Colker RJ "Feminism, Sexuality and Self: A Preliminary Inquiry into the Politics of Authenticity" 1988 68 *Boston University Law Review* 217
- Cook RJ "Enforcing Women's Rights Through Law" 1995 3 *Gender and Development*
- Court JH "Pornography and Sex-Crimes: A Re-Evaluation in the Light of Recent Trends around the World" 1977 5 *International Journal of Criminology* 129
- Currie I "Judicial Avoidance" 1999 15 *SAJHR* 138
- Czapansky K "Gender Bias in the Courts: Social Change Strategies" 1990 - 1991 4 *Georgetown Journal of Legal Ethics* 1
- Dean B "Censorship and the Law" 1976 *Philosophical Papers* 342
- Deavenish G "The Legal and Constitutional significance of the Equality Clause in the Interim Constitution" 1996 7 *Stell LR* 92
- De Ville JR "Legislative History and Constitutional Interpretation" 1999 2 *TSAR* 211
- Donnerstein E, Champion CA, Sunstein CR and MacKinnon CA "Pornography: Social Science, Legal, and Clinical Perspectives" 1986 4(1) *Law & Inequality: A Journal of Theory and Practice* 17
- Dugard J "The Role of International Law in Interpreting the Bill of Rights" 1994 101 *SAJHR* 208
- Dunlap M "Sexual Speech and the State: Putting Pornography in Its Place" 1987 17 *Golden Gate University Law Review* 359
- Du Plessis LM "The Genesis of a Bill of Rights in a divided Society. Observations on the ideological Dialectic

reflected in the Chapter on Fundamental Rights in South Africa's Transitional Constitution" 1995 3 *Jahrbuch für Recht und Ethik* 353

Du Plessis LM "Legal Academics and the Open Community of Constitutional Interpreters" 1996 7(1) *SAJHR* 214

Du Plessis LM "The Bill of Rights in the Working Draft of the New Constitution: an evaluation of aspects of a constitutional text *sui generis*" 1996 7(1) *Stell LR* 3

Du Plessis LM "Evaluative Reflections on the Final Text of South Africa's Bill of Rights" 1996 7(3) *Stell LR* 283

Du Plessis LM "Die Inhoud, Betekenis en Enkele Implikasies van die Handves van Regte in die 1996-Grondwet" 1997 24(1) *Politikon* 5

Du Plessis LM and De Ville JR "Bill of Rights Interpretation in the South African Context (1): Diagnostic Observations" 1993(a) 4(1) *Stell LR* 63

Du Plessis LM and De Ville JR "Bill of Rights Interpretation in the South African Context (2): Prognostic Observations" 1993(b) 4(2) *Stell LR* 199

Du Plessis LM and De Ville JR "Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects" 1993(c) 4(3) *Stell LR* 356

Du Plessis LM and Gouws A "The gender Implications of the Final Constitution (with particular Reference to th Bill of Rights)" 1996 11(2) *SAPL/PR* 472

Dworkin A "Against the Male Flood: Censorship, Pornograpy, and Equality" 1985 8 *Harvard Women's Law Journal* 1

Dworkin A "Against the Male Flood: Censorship, Pornography, and Equality" Summer 1985 *Trivia: A Journal of Ideas* 11

Dworkin R "Is there a Right to Pornography?" 1981 *The Oxford Journal of Legal Studies* 177

Dworkin R "Law, Philosophy and Interpretation" 1994 80(3) *Archiv für Rechts - und Sozialphilosophie* 463

Dyzenhaus D "Pornography and Public Reason" 1994 7(2) *Canadian Journal of Law and Jurisprudence* 261

Eaton M "Case Comment on *Andrews v Law Society of British Columbia*" 1990 4(2) *Canadian Journal of Women and the Law* 276

Easton S "Pornography as Incitement to Sexual Hatred" 1995 3(1) *Feminist Legal Studies* 89

Ely JH "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis" 1975 88 *Harvard Law Review* 1482

Fallon RH "What is Republicanism and is It Worth Reviving" 1989 102 *Harvard Law Review* 1695

Ferris LA and Bonthuys E "Turn-on or turn off - pornography in the context of the Constitution" 1998 9(1) *Stell LR* 54

Fields RM "In Search of Democracy: Reconciling Majority Rule, Minority Rights and Group Rights in South Africa and the United States" 1996 16 *Boston College Third World Law Journal* 65

Finnis JM "'Reason and Passion': The Constitutional Dialectic of Free Speech and Obscenity" 1960 116 *University of Pennsylvania Law Review* 222

Fish A "Hate Promotion and Freedom of Expression: Truth and Consequences" 1989 2(2) *Canadian Journal of Law and Jurisprudence* 111

Freeman A "Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of the Supreme Court Doctrine" 1978 62 *Minnesota Law Review* 1049

Frotscher W "Grundrechtsverständnis in der Gegenwart - Funktionen der Grundrechte" 1994 9(34) *Jus - Lernbogen: Zur Vorbereitung auf die Anfängerübungen* 65

Gardbaum SA "Law, Politics and the Claims of Community" 1992 90 *Michigan Law Review* 685

Gilligan C "In a Different Voice: Women's Conceptions of Self and of Morality" 1977 47(4) *Harvard Educational Review*

- Gilligan C "Woman's Place in Man's Life Cycle" 1979 49(4) *Harvard Educational Review*
- Gold "Equality Before the Law in the Supreme Court of Canada" 1980 18 *Osgoode Hall Law Journal* 336
- Harris A "Race and Essentialism in Feminist Legal Theory" 1990 42 *Stanford Law Review* 581
- Higgins TE "Democracy and Feminism" 1997 110(8) *Harvard Law Review* 1657
- Hunter ND and Law S "Brief of Amici Curiae of Feminist Anti-Censorship Taskforce" 1987 - 1988 21 *University of Michigan Journal of Law Reform* 69
- Hutchinson AC "Doing the Right Thing? Toward A Postmodern Politics" 1992 26(4) *Law and Society Review* 773
- Hutchinson AC "In Other Words: Putting Sex and Pornography in Context" 1995 8(1) *Canadian Journal of Law and Jurisprudence* 107
- Irvine L "Response to Sir John Laws" 1996 *Public Law* 636
- Isensee J "The people as the basis of the constitution - Concerning the European doctrine of the constituent power" 1996 21(1) *Journal for Juridical Science / Tydskrif vir Regswetenskap* 117
- Ison TG "The Canadian Charter of Rights: Lessons and Laments" 1997 60(4) *The Modern Law Review* 499
- Jackson E "The Problem with Pornography: A Critical Survey of the Current Debate" 1995 3(1) *Feminist Legal Studies* 49
- Jackson K "Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal" 1992 19(2) *Journal of Law and Society* 195
- Jaconelli J Book Review on Kevin W Saunders' "Violence as Obscenity: Limiting the Media's First Amendment Protection" 1997 60 *The Modern Law Review* 882
- Johannessen L "Freedom of Expression and Information in the New South African Constitution and its Compatibility with International Standards" 1994 10 *SAJHR* 216
- Jordan EC "Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Faults Line in Political Discourse" 1992 15 *Harvard Women's Law Journal* 1
- Jurgens E "Iudex haruspex of: grondwetsuitleg door het schouwen van ingewanden" 1996 3 *Regel Maat* 99
- Kadidal S "Obscenity in the Age of Mechanical Reproduction" 1996 XLIV(2) *The American Journal of Comparative Law* 353
- Kahn E "When the Lion Feeds - and the censor pounces: A disquisition on the banning of immoral publications in South Africa" 1966 *SALJ* 278
- Karpen U "Freedom of Expression as a Basic Right: A German View" 1989 37 *The American Journal of Comparative Law* 395
- Kelly L and O'Hara M "The Making of Pornography: An Act of Sexual Violence" 1990 213 *Spare Rib* 12
- Klug H "Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review" 1997 *SAJHR* 185
- Kutchinsky B "Towards an Explanation of the Decrease in Registered Sex Crimes in Copenhagen" 1971 7 *Technical Report of the Commission of Obscenity and Pornography*
- Kutchinsky B "The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience" 1973 29(3) *Journal for Social Issues* 163
- Lahey KA "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" 1984/1985 20(4) *New England Law Review* 649
- Laws J "The Constitution: Morals and Rights" 1996 *Public Law* 62
- Lester L "The Georgetown conclusions on the effective protection of human rights through law" 1996 *Public Law* 562
- Leventhal H "An Empirical Study into the Effects of *Miller v California* on the Control of Obscenity" 1977 52

- (4 - 6) *New York University Law Review* 810
- Levi EH "An Introduction to Legal Reasoning" 1948 15(3) *University of Chicago Law Review* 501
- L'Heureux-Dube C "Making a Difference: The Pursuit of Equality and a Compassionate Justice" 1997 13 *SAJHR* 335
- Lindgren J "Defining Pornography" 1993 141(4) *University of Pennsylvania Law Review* 1153
- Linz D, Donnerstein E and Penrod S "The Effects of Multiple Exposure to Filmed Violence Against Women" 1984 34 *Journal of Communication* 130
- Littleton C "Feminist Jurisprudence: The Difference Method Makes" 1989 41 *Stanford Law Review* 751
- Lötter S "Criminal law, feminism and pornography" 1997 12 *SAPL/PR* 423
- Loveday G "Gender discrimination in the workplace" 1997 1 *TSAR* 100
- Lynn BW "'Civil Rights' Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation" 1986 21(1) *Harvard Civil Rights - Civil Liberties Law Review* 27
- MacKinnon CA "Not a Moral Issue" 1984 2(291) *Yale Law & Policy Review* 321
- MacKinnon CA "Pornography, Civil Rights and Speech" 1985 20 *Harvard Civil Rights - Civil Liberties Law Review* 1
- MacKinnon CA "Graduation Address: Yale Law School June 1989" 1990 2(2) *Yale Journal of Law and Feminism* 299
- MacKinnon CA "Pornography as Defamation and Discrimination" 1991 71(4) *Boston University Law Review* 793
- MacKinnon CA "From Practice to Theory, or What is a White Woman Anyway" 1991 4(1) *Yale Journal of Law and Feminism* 13
- MacKinnon CA "Reflections on Sex Equality Under Law" 1991 100 *The Yale Law Journal* 1281
- MacKinnon CA "Pornography Left and Right: A Review of Richard A Posner's *Sex and Reason* and Edward de Grazia's *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*" 1995 30(1) *Harvard Civil Rights - Civil Liberties Law Review* 143
- Mahoney KE "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" 1992 55(1) *Law and Contemporary Problems* 77
- Mahoney KE "The Constitutional Law of Equality in Canada" 1992 24(2) *New York University Journal of International Law and Politics* 759
- Mahoney KE "Theoretical Perspectives on Women's Human Rights and Strategies for Their Implementation" 1996 21(3) *Brooklyn Journal of International Law* 199
- Mahoney MR "Whiteness and Women, in Practice and Theory: A Reply to Catharine MacKinnon" 1993 5(2) *Yale Journal of Law and Feminism* 217
- Majury D "Equality and Discrimination According to the Supreme Court of Canada" 1990 - 1991 4(2) *Canadian Journal of Women and the Law (CJWL)* 407
- Malamuth N and Check J "Penile Tumescence and Perceptual Responses to Rape as a Function of the Victim's Perceived Reactions" 1980 10 *Journal of Applied Social Psychology* 528
- Manfredi CP "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" 1992 XL(1) *The American Journal of Comparative Law* 213
- Marcus G "The Wider Reaches of Censorship" 1985 1 *SAJHR* 69
- Matsuda M "Looking to the Bottom: Critical Legal Studies and Reparations" 1987 22 *Harvard Civil Rights - Civil Liberties Law Review* 232
- Matsuda M "Public Response to Racist Speech: Considering the Victim's Story" 1989 87 *Michigan Law Review* 2320
- Matsuda M "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" 1989 11 *Women's Rights Reporter* 7

- McCormack T "If Pornography is the Theory, is Inequality the Practice?" 1993 23 *Philosophy of Social Science* 298
- Meyerson D "No Platform for Racists: What Should the View of those on the Left Be?" 1990 6 *SAJHR* 394
- Meyerson D "Sexual Equality and the Law" 1993 9 *SAJHR* 237
- Michelman F "Universities, Racist Speech and Democracy in America: An Essay for ACLU" 1992 27 *Harvard Civil Rights - Civil Liberties Law Review* 339
- Mills EH "A Discussion of D Cornell 1991 *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law*" 1992 27(1) *Harvard Civil Rights - Civil Liberties Law Review* 281
- Mincberg EM "The Supreme Court and the First Amendment: The 1993 - 94 Term" 1994 12 (Part 1) *New York Law School Journal of Human Rights* 31
- Mosher and Katz "Pornographic Films, Male Verbal Aggression Against Women, and Guilt" 1971 8 *Technical Report on Obscenity and Pornography* US Government Printing Office USA
- Mureinik E "A bridge to where? Introducing the interim bill of rights" 1994 10 *South African Journal on Human Rights (SAJHR)* 31
- Neisser "Hate Speech in the New South Africa" 1994 *SAJHR* 336
- Norris M "Ex Parte Smith: Irrationality and human rights" 1996 *Public Law* 590
- Olsen FE "Feminism in Central and Eastern Europe: Risk and Possibilities of American Engagement" 1997 106(7) *The Yale Law Journal* 2215
- Pateman C "Review of Genevieve Lloyd's *Man of Reason*" 1986 14 *Political Theory*
- Powell J "Reviving Republicanism" 1988 97 *Yale Law Journal* 1703
- Putman H "A Reconsideration of Deweyan Democracy" 1990 63 *University of Southern California Law Review* 1671
- Quistgaard B "Pornography, Harm, and Censorship: A Feminist (Re)vision of the Right to Freedom of Expression" 1993 52(1) *University of Toronto Law Review* 132
- Réaume D "The Social Construction of Women and the Possibility of Change: Unmodified Feminism Revisited" 1992 5(1) *Canadian Journal of Women and the Law* 463
- Réaume D "What's Feminist About a Feminist Analysis of Law: A Conceptual Analysis of Women's Exclusion from Law" 1996 2(4) *Legal Theory* 265
- Rich A "Compulsory Heterosexuality and Lesbian Existence" 1980 5(4) *Signs: Journal of Women in Culture and Society*
- Richards DAJ "Toleration and Free Speech" 1988 17 *Philosophy and Public Affairs* 323
- Rosaldo MZ "The Use and Abuse of Anthropology: Reflections on Feminism and Cross-Culture Understanding" 1980 5(3) *Signs: Journal of Women in Culture and Society* 394
- Rosga A "Review of Samuel Walker's 'Hate Speech: The History of an American Controversy'" 1996 14 *Law and History Review* 191
- Russell DEH "The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females" 1983 7 *Victimology: An Interdisciplinary Journal* 1
- Russell DEH "Pornography and Rape: A Causal Model" 1988 9 *Political Psychology* 41
- Sadurski W "On 'Seeing Speech Through an Equality Lens': A Critique of Egalitarian Arguments for Suppression of Hate Speech Pornography" 1996 16(4) *Oxford Journal of Legal Studies* 713
- Scales AC "The Emergence of Feminist Jurisprudence: An Essay" 1986 *Yale Law Journal* 1373
- Scanlon T "A Theory of Freedom of Expression" 1972 1 *Philosophy and Public Affairs* 204

- Scanlon T "Freedom of Expression and Categories of Expression" 1979 40 *University of Pittsburg Law Review* 519
- Schafran LH "Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts" 1986 9(2) *Women's Rights Law Reporter* 109
- Scheffler S "National Rights, Equality and the Minimal State" 1976 6 *Canadian Journal of Philosophy* 59
- Schroeder JL "The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory" 1992 5(1) *Yale Journal of Law and Feminism* 123
- Schwartz LB "Moral Offenses and the Penal Code" 1963 63(3) *Columbia Law Review* 669
- Schwartz RF "Federal Child Pornography Law's Scienter Requirement - *United States v X-Citement Video Inc*" 1993 28(2) *Harvard Civil Rights - Civil Liberties Law Review* 585
- Seator P "Judicial Difference to Pornography's Harm: *American Booksellers v Hudnut*" 1987 17 *Golden Gate University Law Review* 297
- Smart C "Feminism and the law: some problems of analysis and strategy" (1986) 14 *International Journal of the Sociology of Law*
- Smart C "Law's Power, The Sexed Body, and Feminist Discourse" 1990 17(2) *Journal of Law and Society* 194
- Smith N "Policing Pornography" 1997 13(2) *SAJHR* 292
- Starck C "Constitutional Review and the Theory of Interpretation" 1994 7 *Jahrbuch zur Staats- und Verwaltungswissenschaft* 43
- Stellings B "The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship" 1993 28(1) *Harvard Civil Rights - Civil Liberties Law Review* 185
- Steytler N "The Judicialisation of Namibian Politics" 1993 9 *SAJHR* 477
- Stith R "Can Practice Do Without Theory? Differing Answers in Western Legal Education" 1994 80(3) *Archiv für Rechts- und Sozialphilosophie* 426
- Stone GR "Anti-pornography Legislation as Viewpoint Discrimination" 1986 9(1) *Harvard Journal of Law & Public Policy* 461
- Strossen N "A Feminist Critique of 'The' Feminist Critique of Pornography" 1993 79(5) *Virginia Law Review* 1099
- Sunstein CR "Pornography and the First Amendment" 1986 1986(4) *Duke Law Journal* 589
- Sunstein CR "Notes on Pornography and the First Amendment" 1986 4(3) *Law & Inequality: A Journal of Theory and Practice* 28
- Sunstein CR "Feminism and Legal Theory" (Book Review of CA MacKinnon's *Feminism Unmodified: Discourse on Life and Law* 1987) 1988 101(1 - 4) *Harvard Law Review* 826
- Sunstein CR "Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)" 1992 92(1) *Columbia Law Review* 1
- Van der Vyver J "Censorship in South Africa by JCW van Rooyen" 1988 2 *De Jure* 182
- Van der Westhuizen JV "Do We have to be Calvinist Puritans to Enter the New South Africa?" 1990 6 *SAJHR* 425
- Van Marle K "Cornell se argument van 'equivalent rights' en haar bespreking van pornografie" 1996 11(2) *SAPL/PR* 574
- Van Marle K "Die etiese feminisme van Cornell" 1997 60(2) *Tydskrif vir Hedendaagse Romeins Hollandse Reg (THRHR)* 314
- Van Reenen TP "Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa" 1997 12 *SAPL/PR* 151
- Van Rooyen JCW "Censorship in a future South Africa: A legal perspective" 1993 2(26) *De Jure* 283
- Van Zyl "What do Women want from the Law?" 1992 109 *SALJ* 509
- Vogelman L and Eagle G "Overcoming Endemic Violence against Women in South Africa" 1991 18(1 - 2) *Social Justice* 209

- Ward CV "On Difference and Equality" 1997 3(1) *Legal Theory* 65
- Wechsler H "Toward Neutral Principles of Constitutional Law" 1959 - 1960 73(1) *Harvard Law Review* 1
- West R "The Difference in Women's Hedonic Lives: A Phenomenological Critique" 1987 8 *Wisconsin Women's Law Journal*
- Westen P "The Empty Idea of Equality" 1982 95(3) *Harvard Law Review* 537
- Wilkinson TM "Dworkin on Paternalism and Well-Being" 1996 16(3) *Oxford Journal of Legal Studies* 433
- Williams B "Are Persons Bodies? Personal Identity and Individualism" 1973 64 *Problems of Self*
- Willis CE "The Phenomenology of Pornography: A Comment on Catharine MacKinnon's *Only Words*" 1997 16(2) *Law and Philosophy* 177
- Wolhuter L "Horizontalism in the interim and final Constitutions" 1996 11(2) *SAPL/PR* 512 - 527
- Wolhuter L "Equality and the Concept of Difference: Same-Sex Marriages in the Light of the Final Constitution" 1997 114 (Part 2) *SALJ* 389
- Zillmann D and Bryant J "Effects of Prolonged Consumption of Pornography on Family Values" 1988 9 *Journal of Family Issues* 518

TABLE OF CASES

SOUTH AFRICA

A

African National Congress (Border Branch) v Chairman, Council of State Republic of Ciskei 1992 (4) SA 434 (CK GD)

B

Bernstein and Others v Bester NO and Others 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC)
Brink v Kitshoff NO 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC)
Buthelezi v South African Broadcasting Corporation 1997 (12) BCLR 1733 (D)

C

Case v Minister of Safety and Security (unreported Case No CCT 20/95)
Curtis v Minister of Safety and Security (unreported Case No CCT 21/95)
Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)
Certification of the Amended Text of the Final Constitution 1997 (1) BCLR 1 (CC)
Christian Education South Africa v Minister of Education 1999 (9) BCLR 951 (SE)
Christian Lawyers Association of South Africa v The Minister of Health 1998 (11) BCLR 1434 (TPD)
City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)
Coetzee v Government of the Republic of South Africa 1995 (10) BCLR 1382 (CC)
Collins v Minister of the Interior 1957 (1) SA 552 (A)
Commissioner of Customs v Joffe 1934 WLD 8
Commissioner of Customs and Excise v Watchtower Bible and Tract Society 1941 CPD 438
Commissioner of Customs v Watchtower Bible and Tract Society 1942 AD 203

D

DVB Behuising (Pty) Ltd v North West Provincial Government 2000 (4) BCLR 347 (CC)
De Lange v Smuts NO 1998 (7) BCLR 779 (CC)
Democratic Party v Minister of Home Affairs 1999 (3) SA 254 (CC)
Directorate of Publications v Brandwagpers (Pty) Ltd (unreported decision handed down on July 9, 1975)
Dawood v The Minister of Home Affairs (unreported Case No CCT 35/99; handed down on June 7, 2000)
Du Plessis and others v De Klerk and Others CCT 8/95
Du Plessis v De Klerk 1996 5 BCLR 658 (CC)

E

East Zulu Motors v Epangeni/Ngwelezane Transitional Council 1998 (1) BCLR 1 (CC)
Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 887 (CC); 1995 (10) BCLR 1289 (CC)
Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Policy Bill 83 of 1995 1996 (3) SA 617 (CC); 1996 (4) BCLR 537 (CC)

F

Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC)
Ferreira v Levin NO 1996 (1) SA 984 (CC)
Fraser v Children's Court, Pretoria North and Others 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC)

G

Gardener v Whitaker (unreported Case No CCT 26/94)
Goeie Hoop Uitgewers v Central News Agency 1952 (2) SA 843 (W)

H

Harksen v Lane NO and Others 1997 (11) BCLR 1489 (CC)
Harris v Minister of the Interior 1952 (2) SA 428 (A)
Heads of Argument in the Matter between *Case and Curtis v Minister of Safety and Security, Minister of Justice, Attorney-General* (unreported Case No CCT 20/95 and Case No CCT 21/95)
Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A)
Holomisa v Argus Newspapers Ltd 1996 (6) BCLR 836 (W)

I

In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC)

J

JT Publishing (Pty) Ltd v Directorate of Publications and Another 1995 (1) SA 735 (T)
JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and others (unreported Case No CCT 49/95)
Jooste v Score Supermarkets Trading (Pty) Ltd 1999 (2) SA 1 (CC)

K

Kruger and Another v Minister of Correctional Services and others 1995 (2) SA 803 (T)

L

Larbi-Odam v MEC for Education (North-West Province) 1998 (1) SA 745 (CC)

M

MacMillan (South Africa) Publishers (Pty) Ltd v The Committee of Publications (unreported Case No 23)
Mandela v Falati 1994 (4) BCLR 1 (W)
Marshall-Cavendish Ltd v Publications Control Board 1965 (4) SA 173 (AD)
Minister of the Interior v Harris 1952 (4) SA 769 (A)
Mistry v Interim National Medical and Dental Council of South Africa and Others 1998 (7) BCLR 880 (CC)

N

National Coalition for Gay & Lesbian Equality v Minister of Justice 1998 (12) BCLR (CC); 1999 (1) SA 6 (CC)
National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (3) SA 173 ©
Nel v Le Roux NO 1996 (3) SA 562 (CC)

P

Premier of KwaZulu-Natal v President of the Republic of South Africa 1996 (1) SA 984 (CC); 1995 (12) BCLR 1561 (CC)

President of the Republic of South Africa and Minister of Correctional Services v Hugo (unreported Case No CCT 11/96)

President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (CC)

Prinsloo v Van der Linde 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC)

Publications Control Board v Republican Publishers (Pty) Ltd 1977 (1) SA 288 (AD)

Publications Control Board v William Heinemann Ltd and Others 1965 (4) SA 137 (AD)

Q

Qozoleni v Minister of Law and Order 1994 (1) BCLR 75 (E)

R

Rex v Bungaroo 1904 NLR 28

Regina v De Jongh 1894 11 SC 326

Rex v Hardy 1905 26 NLR 165

Regina v Marais 1886 6 SC 367

Rex v Shaw 1910 CPD

Rex v Mcunu 1940 NPD 99

Rex v Meinert 1932 SWA 56

Rex v Swiggelaar 1950 (1) PH H61 (A)

Randburg Town Council v Kerksay Investment (Pty) Ltd 1998 (1) SA 98

S

Shabalala and others v Attorney-General, Transvaal and Another 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC)

Soobramoney v Minister of Health (KwaZulu-Natal) (unreported; handed down on Nov, 27 1997)

South African Magazine Co v Publications Control Board 1966 (2) SA 148 (AD)

South African National Defence Force Union v Minister of Defence 1999 (4) SA 469 (CC)

S v Baloyi 2000 (1) BCLR 86 (CC)

S v Bhulwana 1996 (1) SA 338 (CC)

S v Coetzee 1997 (3) SA 527 (CC)

S v Cornelissen; Cornelissen v Zeelie NO 1994 (2) SACR 41 (W)

S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 (7) BCLR 771 (CC)

S v F 1990 (1) SACR 238 (A)

S v K 1997 (9) BCLR 1283 (C)

S v Lawrence; S v Negal; S v Solberg 1997 (10) BCLR 1348 (CC)

S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)

S v Mhlungu 1995 (3) SA 391 (CC); 1995 (7) BCLR 791 (CC)

S v Ntuli 1996 (1) BCLR 141 (CC)

S v S 1971 (2) SA 591 (A)

S v Shabalala 1996 (1) SA 725 (CC)

S v Williams 1995 (3) SA 632 (CC)

S v Zuma 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC)

S v Zuma and Two Others CC Case No CCT/5/94 (reported; handed down on April 5, 1995)

W

Whittaker v Roos and Bateman 1912 AD 92

FOREIGN JURISDICTIONS

CANADA

A

Andrews v Law Society of British Columbia [1989] 1 SCR 143; 56 DLR (4th) 1

B

Binder v Canada (1985) 23 DLR (4th) 481

Black et al v Law Society of Alberta (1986) 68 AR 259 3 WWR 59 (Alb CA)

Bliss v Attorney-General of Canada [1997] 1 SCR 183 (SCC)

Brodie v The Queen [1962] SCR 681

Brooks v Canada Safeway Ltd [1989] 1 SCR 1219

C

Canada (Canadian Human Rights Commission) v Taylor [1990] 3 SCR 892

Cox v Canada UN Commission on Human Rights, Communication No 539/1993 (reported on November 3, 1993)

D

Dechow v The Queen [1978] 1 SCR 951

E

Edmonton Journal v Attorney General of Alberta et al (1987) 78 AR 375 5 WWR 85 (Alb CA)

Edmonton Journal v Alberta (Attorney-General) et al [1989] 2 SCR 1326; 64 DLR (4th) 583

Egan v The Queen in the right of Canada; Attorney-General of Quebec (1995) 29 CRR 79

F

Ford v Quebec (Attorney General) [1988] 2 SCR 712

G

Germain v The Queen [1985] 2 SCR 241

Glad Day Bookshop Inc v Deputy Minister of National Revenue (Customs and Excise) (July 14 1992) DCC 619/90 (Ont Gen Div)

Grier v Alberta Optometric Association et al (1987) 79 AR 36 5 WWR 539

I

Irvin Toy Ltd v Québec (Procureur Général) [1989] 1 SCR 927

J

Janzen v Platy Enterprises [1989] 1 SCR 1252

M

Mahe v The Queen in Right of Alberta 42 DLR (4th) 514; (1990) 46 CRR 193
Miron v Trudel (1995) 29 CRR (2d) 189

O

Osborne v Canada (Treasury Board) [1991] 2 SCR 69

R

RWDSU V Dolphin Delivery Ltd [1986] 2 SCR 573
Reference re section 94(2) of the Motor Vehicle Act (British Columbia) (1986) 18 CRR 30
Reference re ss 193 and 195.1(1)(c) of the Criminal Code [1990] 3 SCR 1123
Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Limited [1987] 33 DLR (4th) 174
Regina v Andrews and Smith (1988) 65 OR (2d) 161 28 OAC 161 (Ont CA)
Regina v Ariadne Developments Ltd (1974) 19 CCC (2d) 49 (NSSC AD)
Regina v Big M Drug Mart [1985] 1 SCR 295; 18 DLR 321
Regina v Butler [1992] 1 SCR 452; (1992) 89 DLR (4th) 449
Regina v Cameron (1966) 58 DLR (2d) 486 (Ont CA)
Regina v Campbell (1974) 17 CCC (2d) 180 (Ont Co Ct)
Regina v Chaulk [1990] 3 SCR 1303
Regina v Close [1948] VLR 445
Regina v Dominion News & Gifts (1962) Ltd [1963] 2 CCC 103 (Man CA)
Regina v Doug Rankie Co 36 CR (3d) 154 (1983) 9 CCC (3d) 53 (Ont Co Ct)
Regina v Duthie Books Ltd (1966) 58 DLR (2d) 274 (BCCA)
Regina v Fringe Product Inc (1990) 53 CCC (3d) 422 (Ont Dist Ct)
Regina v Goldberg [1971] 3 OR 323 (CA)
Regina v Grey (1982) 65 CCC (2d) 353 (Ont HC)
Regina v Great West News Ltd [1970] 4 CCC 307 (Man CA)
Regina v Harris (1977) 43 APR 104 (NS Co Ct)
Regina v Hawkins (1993) 6 CCC (3d) 246
Regina v Jahelka, Stagitita (1987) 79 AR 44 54 Alta LR (2d) 1 (Alb CA)
Regina v Keegstra (1988) 60 Alta LR (2d) 1; 5 WWR 211 87 AR 177 (Alb CA), reversing 19 CCC (3d) 254 (Alb QB)
Regina v Keegstra [1990] 3 SCR 697
Regina v Kiverago (1973) 11 CCC (2d) 463 (Ont CA)
Regina v Kleppe (1977) 35 CCC (2d) 168 (Ont Prov Ct)
Regina v M(C) (1995) 23 OR (3d) 629
Regina v Nocols 43 CR (3d) 54 (1984) 17 CCC (3d) 555 (Ont Co Ct)
Regina v Oakes (1986) 26 DLR (4th) 200
Regina v Odeon Morton Theatres Ltd (1974) 16 CCC (2d) 185
Regina v Park [1995] 2 SCR 836 (SCC)
Regina v Perreira-Vasquez 26 BCLR (2d) 273; (1988) 64 CR (3d) 253 (BCCA)
Regina v Pink Triangle Press et al (1979) 45 CCC (2d) 385
Regina v Prairie Schooner News Ltd (1970) 75 WWR 585 (Man CA)
Regina v Ramsingh 14 CCC (3d) 230 (Man QB 1984)

Regina v Red Hot Video Ltd 45 CR (3d) 36 (1985); 18 CCC (3d) 422 (Ont Dist Ct 1990)
Regina v Rioux [1970] 3 CCC 149; 10 DLR (3d) 196; [1969] 1 SCR 599
Regina v Ross Wise (Ont Dist Ct 1990)
Regina v Scythes (January 6 1993) (Ont Prov Div)
Regina v Sidey (1980) 52 CCC 92d 257 (Ont CA)
Regina v Sudbury News Services Ltd (1978) 39 CCC (2d) 1 (Ont CA)
Regina v Sutherland, Amitay and Bowie (1974) 18 CCC (2d) 117 (Ont Co Ct)
Regina v Szunejko (1981) CCC (2d) 359 (Ont Prov Ct)
Regina v Town Cinema Theatres Ltd (1985) 18 CCC (3d) 193; (1985) 18 DLR (4th) 1; [1985] SCR 494
Regina v Turpin [1989] 1 SCR 1296
Regina v Video World Ltd [1986] 22 CCC (3d) 331; [1986] 1 WWR 413 36 Man R (2d) 68 (Man CA); [1987] 1 SCR 1255
Regina v Wagner (1985) 43 CR (3d) 318 (Alta QB); 50 CR (3d) 175 (Alta CA 1986); 50 CR (3d) 175 (SCC)
Regina v Zundel [1992] 2 SCR 731
Rocket v Royal College of Dental Surgeons of Ontario [1990] 2 SCR 232

S

Saskatchewan Human Rights Commission v Waldo 5 Can Human Rights Rep (1985)
Slaight Communications Inc v Davidson [1989] 1 SCR 1038

T

The Queen v Doug Rankie Co Ltd 36 CR 3d 154 (Ont Co Ct 1983)
Towne Cinema Theatres Ltd v The Queen 45 CR 3d 1 (BC Ct App 1985); [1985] 1 SCR 494

U

United States v Cotroni (1990) 42 CRR 101

EUROPEAN COURT OF HUMAN RIGHTS

A

Ahmet Sadik v Greece [1997] HRCD Vol VIII No 2 133

W

Wingrove v UK [1997] HRCD Vol VIII No 2 116

INDIA

I

India Express Newspaper (Bombay) Pvt Ltd v Union of India [1985] 2 SCR 287
Indira Nehru Gandhi v Raj Narain (1975) AIR SC 2299

R

Ranjit D Udeshi v Maharashtra 1 SCR 65 (1965) ASC 881

NAMIBIA

E

Ex parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC)

K

Kauesa v Minister of Home Affairs 1994 (3) BCLR 1 (NmH);
Kauesa v Minister of Home Affairs 1995 (11) BCLR 1540 (NmS)

S

S v M (2) 1990 (1) SACR 456 (N)
State v Van Wyk 1992 (1) SACR 147 (Nm SC)

UNITED KINGDOM

M

Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)

R

Rex v Sidley (1663) 1 Sid 168 82 ER 1036
Rex v Curl (1727) 2 Stra 93 ER 849
Regina v Hicklin (1868) LR 3 QB 360
Regina v Reiter (1954) 1 All ER 741

UNITED STATES OF AMERICA

A

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v Attorney General of Massachusetts 383 US 413 (1966)
Abington School District v Schempp 374 US 203 (1963)
Abrams v United States 250 US 616; 40 S Ct 17 (USSC) (1919)
Adams Theatre Co v Keenan 12 J 267; 96 A2d 519
American Booksellers Association v Hudnut 771 F2d 323 (7th Cir 1985); affirmed 475 US 1001 (1986); appeal denied 475 US 1132 (1986)
American Civil Liberties Union v City of Chicago 3 Ill 2d 334; 121 NE 2d 585 (1954)
Anti-defamation League of B'nai B'rith v FCC 403 F2d 169 9DC Cir) (1968)
Arnold v City of Seminole 614 F Supp 853 (ED Okla 1985)
Attorney General v "God's Little Acre" 326 Mass 281 93 NE 2d 819 (1950)

B

Bantam Books Inc v Melko 25 NJ Super 292; 96 A2d 47
Bates v State Bar of Arizona 433 US 350 (1977)
Beard v Alexandria 341 US 622 (1951)
Beauharnais v The State of Illinois 343 US 250; 96 L ed 919; 77 S Ct 729 (1952)
Brandenburg v The State of Ohio 395 US 444 (1969)
Brockett v Spokane Arcades Inc 472 US 491 (1985)
Brooms v Regal Tube Co 881 F 2d 412 (7th Cir 1989)
Brown v Board of Education 347 US 483 (1954)

C

CF Griggs v Duke Power Company 410 US 424 (1971)
Cantwell v Connecticut 310 US 296 (1940)
Central Hudson Gas v Public Service Commission 447 US 557 (1980)
Chaplinsky v New Hampshire 315 US 568 (1942)
City of Minot v Central Avenue News Inc 308 NW 2d 851 (ND 1981)
Civil Rights Cases 1883 109 US 11
Collin v Smith 439 US 916 (1978)
Commonwealth v Buckley 200 Mass 346 86 NE 910; 22 LRA NS 225
Commonwealth v Friede 271 Mass 318 171 NE 472 (1930)
Commonwealth v Gordon 66 PaD&C 10 affirmed
Commonwealth v Holmes 17 Mass 335 (1821)
Commonwealth v Isenstadt 318 Mass 543; 62 NE 2d 840 (1945)
Commonwealth v Sharples 2 Serg & R 91; 7 Am Dec 632 (Pa 1815)

D

Debs v United States 249 US 211; 39 S Ct 252 (USSC) (1919)
Dennis v United States 341 US 494 (1952)
Doe v University of Michigan 721 F Supp 852 9ED Mich) (1989)

E

Eisenstadt v Baird 405 US 438 (1972)
Excelsior Pictures Corporation v Regents of the State of New York 3 NY 2d 237 144 NE 2d 31 165 NYS 2d 42 (1957)
Ex Parte Jackson 96 US 727; 24 L ed 877

F

Frohwerk v United States 249 US 211; 39 S Ct 252 (USSC) (1919)

G

Ginsburg v United States 383 US 463 (1966)
Gitlow v New York 268 US 652; 45 S Ct 652 (USSC) (1927)
Globe Newspaper v Superior Court 457 US 596 (1982)
Gregg v The State of Georgia 428 US 153 (1976)
Griswold v Connecticut 381 US 479 (1965)

H

xliii

Hannegan v Esquire Inc 327 US 145; 90 L ed 586; 66 S Ct 456
Hess v The State of Indiana 414 US 105 (1973)
Hoke v United States 22 US 308; 57 L ed 523; 3 S Ct 281; 43 LRA NS 906

I

Interstate Circuit Inc v Dallas 390 US 701; 20 L Ed 2d 225

J

Jacobellis v Ohio 378 US 184 (1964)

Jenkins v Georgia 418 US 153 (1974)
Joseph Burstyn Inc v Wilson 242 US 495 (1952)

K

Kahn v Leo Feist Inc (DC NY) 70 F Supp 4; affirmed (CA 2d) 165 F2d 188
Kaplan v California 413 US 115 (1973)
Kois v Wisconsin 408 US 229 (1972)
Kovacs v Cooper 336 US 77 (1949)
Knowels v State 3 Day 103 (Conn 1808)

L

Lovell v City of Griffin 303 US 444 (1938)

M

MacFadden v United States 9CA3d NJ) 165 F 51
Manual Enterprises Inc v Day 370 US 478 (1962)
Marsh v Alabama 326 US 501 (1946)
Martin v City of Struthers 319 US 141 (1943)
Marvin Miller v State of California 413 US 15 (1973)
Memoirs v Massachusetts 383 US 413 (1966)
Meyer v Nebraska 262 US 390 (1923)
Mishkin v New York 383 US 502 (1966)
Mississippi University for Women v Hogan 458 US 718 (1982)
Missouri v Becker 364 Mo 1079; 272 AW 283

N

Near v Minnesota 283 US 697 (1931)
New York v Ferber 458 US 747 (1982)
New York Times v Sullivan 376 US 254 (1964)

O

Oregon v Mitchell 400 US 112 (1970)
Osborne v Ohio 495 US 103 (1990)

P

Palko v Connecticut 302 US 319
Parmelee v United States 72 App DC 203; 113 F2d 729
Paris Adult Theatre 1 et al v Lewis R Slaton, District Attorney, Atlanta Judicial Circuit, et al 413 US 49 (1973)
Penthouse International v McAuliffe 610 F 2d (1978)
People v Doubleday & Co 297 NY 687 77 NE 2d 6 (1947) affirmed 335 US 848 (1948)
Police Department v Mosley 408 US 92 (1972)
Prince v The State of Massachusetts 321 US 158 (1944)
Public Clearing House v Coyne 194 US 497; 48 L ed 1092; 24 S Ct 789
Purple Onion Inc v Jacson 511 F Supp 1207 (ND Ga 1981)

R

Rabe v Washington 405 US 313; 31 L Ed 2d 258; 92 S Ct 993 (1972)
Redrup v The State of New York 386 US 767 (1967)
Robertson v Baldwin 165 US 275; 4 L ed 715; 17 S Ct 326
Roe v Wade 410 US 113 (1973)
Rosen v United States 161 US 29 (1896)
Roth v Goldman (CA2d NY) 172 F2d 78 794

S

Sable Communications v FCC 492 US 115 (1989)
Sai'ler Inn v Kirby 5 Cal 3d 1 485 P2d 529 95 Cal Rptr 329 (1971)
Samuel Roth v United States of America 354 US 476 (1957)
Schenck v United States 249 US 47; 39 S Ct 247 (USSC) (1919)
Stanley v The State of Georgia 394 US 557 (1969)
State v Von Cleef 102 NJ Super 104 (1986)
Swearingen v United States 161 US 446 (1896)

T

Texas v Johnson 491 US 397 (1989)
The People v Wepplo 78 Cal App 2d Supp 959; 178 P2d 853
Thomas v Collins 323 US 516 (1945)
Thornhill v The State of Alabama 310 US 88; 84 L ed 1093; 60 S Ct 736

U

United States v 12 200-Ft Reels of Super 8 MM Film 413 US 123 (1973)
United States v Associated Press 52 F Supp 362 (1964)
United States v Bennett (CC NY) 16 Blatchf 338; F Cas No 14571
United States v Chase 135 US 255; 3 L ed 117; 10 S Ct 756
United States v Clarke (DC Mo) 38 F 500
United States v Cotroni (1990) 42 CRR 101
United States v Dennett (CA NY) 39 F2d 564
United States v Ginzburg 383 US 463 (1966)
United States v Kennerley 209 F119 (SDNY 1913)
United States v Kleiner 663 F Supp 43 (SD Fla 198)
United States v Limehouse 285 US 424 (1932)

xliv

United States v Levine (CA2d NY) 83 F2d 156
United States v One Book Called "Ulysses" 5 F Supp 182 (SDNY 1933); affirmed 72 F 2d 705 (2d Cir 1934)
United States v Orito 413 US 139 (1973)
United States v Reidel 402 US 351; 28 K Ed 2d 813; 91 S Ct 1410 (1971)
United States of America v Samuel Roth 237 F 2d (2d Cir 1956)
United States v Tolczeki 614 F Supp 1424 (ND Oh 1985)
United States v X-Citement Video Inc 982 F 2d 1285 (9th Cir 1992)
Upper Midwest Booksellers Association v City of Minneapolis 780 F2d 1389 8th Cir (1985)

V

Valentine v Chirstensen 316 US 52 (1942)
Virginia v American Bookseller's Association Inc 488 US 905 (1988)
Virginia Pharmacy Bd v Virginia Consumer Council 425 US 748 (1976)
Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc 425 US 748 (1976)

W

Walker v The State of Ohio 398 US 434 (1970)
Walker v Popenoe 80 App DC 129; 149 F2d 511
Ward v Illinois 431 US 6 (1970)
West Virginia State Board of Education v Barnett 319 US 624 (1943)
Whitney v California 274 US 357; 47 S Ct 641 (USSC) (1927)
Winston v Lee 470 US 753 (1985)
Winters v The State of New York 333 US 507; 92 L ed 840; 68 S Ct 665

Y

Young v American Mini-Theaters Inc 42 US 50 (1976)

ZIMBABWE

B

Banana v Attorney-General 1999 (1) BCLR 27 (ZS)

I

In Re Munhumeso 1995 (1) SA 551 (ZSC)

R

Rattigan v Chief Immigration Officer, Zimbabwe 1995 (2) SA 182 (ZSC)

S

State v Hartmann 1984 (1) SA 305 (ZSC)
State v Du Plessis 1992 (1) SACR 594 (ZS)

AMICI CURIAE BRIEFS

Amici Curiae Brief on behalf of the Feminist Ant-Censorship Task Force prepared by Nan Hunter and Sylvia Law in the matter of *American Booksellers Association Inc v William Hudnut* 771 F2d 323 (1985); affirmed 475 US 1001; appeal denied 475 US 1132 (1986)

Amici Curiae Brief on behalf of the Women's Legal Education and Action Fund prepared by Catharine MacKinnon in the matter of *Regina v Butler* [1992] 1 SCR 452; 89 DLR (4th) 449

Amici Curiae Brief on behalf of People Opposing Women Abuse, NICRO Women's Support Centre, the Advice Desk for Abused Women, Rape Crisis, NISAA Institute for Women's Development and Women Against Women Abuse prepared by Joanne Fedler of the Centre of Applied Legal Studies, University of the Witwatersrand in the matter of *Case; Curtis v Minister of Safety and Security* 1996 (5) BCLR 608 (CC)

TABLE OF STATUTES

CONSTITUTIONS AND/OR HUMAN RIGHTS CHARTERS

State Constitutions

South Africa Act of 1909

Constitution of the Republic of South Africa Act 32 of 1961

Constitution of the Republic of South Africa Act 110 of 1983

Constitution of the Republic of South Africa, Act 200 of 1993

Constitution of the Republic of South Africa, Act 108 of 1996

The Constitution of the United States of America

Basic Law for the Federal Republic of Germany of 1949

Canadian Charter of Rights and Freedoms, Constitution Act of 1982 Part I

Constitution of Namibia of 1989

Constitution of Zimbabwe of 1979

International Human Rights Charters

Universal Declaration of Human Rights of 1948

International Labour Organisation Discrimination (Employment and Occupation) of 1958

Convention Against Discrimination in Education of 1960

International Covenant on Economic, Social, and Cultural Rights of 1966

International Covenant on Civil and Political Rights of 1966

Optional Protocol on the International Covenant on Civil and Political Rights of 1966

International Covenant on the Elimination of All Forms of Racial Discrimination of 1966

Convention on the Elimination of All Forms of Discrimination Against Women of 1980

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1981

Regional Human Rights Charters

American Declaration of the Rights and Duties of Man of 1948

The European Convention on Human Rights of 1950

American Convention on Human Rights of 1969

African Charter on Human and Peoples' Rights of 1981

The Inter-American Convention to Prevent and Punish Torture of 1985

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988

STATUTES

South Africa

Customs Act 10 of 1872 (C)

Obscene Publications Act 31 of 1892 (C)

Cape Obscene Publications Act 31 of 1892 (C)

Ordinance 22 of 1898 (N)

Customs Consolidation and Shipping Act 13 of 1899 (N)

Orange Free State Police Offences Ordinance 21 of 1902 (O)

Customs Management Ordinance 23 of 1902 (T)

Customs Amendment and Tariff Act 1 of 1906

Transvaal Criminal Law Amendment Act 38 of 1909 (T)

Customs Management Act 9 of 1913

Customs Management Act 9 of 1923

Entertainments (Censorship) Act 28 of 1931

Customs and Excise Amendment Act 40 of 1934

Insolvency Act 24 of 1936

Customs and Excise Amendment Act 39 of 1939

Local Government Ordinance 21 of 1942 (N)

Customs Amendment Act 35 of 1944

Customs Amendment Act 36 of 1953

Customs Act 55 of 1955

Sexual Offences Act 23 of 1957

Post Office Act 44 of 1958

Publications and Entertainments Act 26 of 1963

Indecent or Obscene Photographic Matter Act 37 of 1967

Publications Act 42 of 1974

Publications and Entertainment Act 26 of 1974

Publications Amendment Act 79 of 1977

Criminal Procedure Act 51 of 1977

Publications Amendment Act 109 of 1978

Publications Amendment Act 44 of 1979

Divorce Act 70 of 1979

Publications Amendment Act 60 of 1986

Liquor Act 27 of 1989

Transfer of Powers and Duties of the State President Act 51 of 1991

Business Act 71 of 1991

Publications Amendment Act 90 of 1992

Independent Broadcasting Authority Act of 1993

Prevention of Family Violence Act 133 of 1993

Abolition of Restrictions on Free Political Activity Act 206 of 1993

Films and Publications Bill 104 of 1995

Films and Publications Act 65 of 1996

South African Schools Act 84 of 1996

Abolition of Corporal Punishment Act 33 of 1997

Electoral Act 73 of 1998

Domestic Violence Act 116 of 1998

FOREIGN JURISDICTIONS

Bobhuthatswana

Bobhuthatswana Publications Act 36 of 1979

Canada

Canadian Criminal Code of 1892

Canadian Human Rights Act of 1982

Canadian Uniform Bill of 1982

Canadian Criminal Code of 1985

Canadian Tariff Code

The Saskatchewan Human Rights Code

Bill C-114 of 1986

Bill C-54 of 1987

Namibia

Racial Discrimination Prohibition Act 26 of 1991

Transkei

Transkei Publications Act 18 of 1977

United Kingdom

Customs Consolidation Act of 1853

Obscene Publications Act of 1857

United States of America

Acts and Laws of the Province of Massachusetts May of 1712

Act for Suppressing Vice and Immorality of 1798

New Jersey Revised Laws of 1800

Massachusetts Bay Colony Charters & Laws of 1814

Act Concerning Crimes and Punishments of 1821

Statutory Laws of Connecticut of 1824

Revised Statute of Connecticut of 1835

Revised Statute of Massachusetts of 1836

Revised Statute of Massachusetts of 1842

Revised Statute of New Hampshire of 1843

The Act for Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use of 1873

The Model Penal Code of 1957

The Protection of Children Against Sexual Exploitation Act of 1977

The Child Protection Act of 1984

Minneapolis Code of Ordinance Relating to Civil Rights of 1984

Indianapolis City-County General Ordinance 24 of 1984

Indianapolis City-County General Ordinance 35 of 1984

Violence Against Women Act of 1994

Venda

Venda Publications Act 15 of 1983

Zimbabwe

Law and Order (Maintenance) Act

COMMISSION REPORTS

SOUTH AFRICA

Report of the Commission of Enquiry in Regard to Undesirable Publications (Cronje Commission Report) (1956)

Report of the Task Group: Film and Publication Control (1994)

Report of the Truth and Reconciliation Commission (TRC Report) (1998)

Interim Report of the Human Rights Commission's Inquiry into Racism in the Media of (2000)

FOREIGN JURISDICTIONS

AUSTRALIA

Report of the Joint Select Committee on Video Material, Commonwealth of Australia (1988)

CANADA

Report of the Special Joint Committee of Senate and House of Commons, Canada (1972)

Report on Pornography: Standing Committee of Justice and Legal Affairs (MacGuigan Report) (1978)

Report of the Special Committee on Pornography and Prostitution (Fraser Report) (1985)

DENMARK

Technical Report of the Commission on Obscenity and Pornography (1971)

NEW ZEALAND

Report of the Ministerial Committee of Inquiry into Pornography (1988)

UNITED KINGDOM

Report of the British Committee on Obscenity and Film Censorship (1979)

UNITED STATES OF AMERICA

Report of the Commission on Obscenity and Pornography (Johnson Commission Report) (1970)

Democratic National Commission on Party Structure and Delegate Selection, Mandate for Reform (1970)

Technical Report of the Commission on Obscenity and Pornography (1971)

Report of the Commission on Obscenity (Williams Commission Report) (1979)

Attorney General's Commission on Pornography (Meese Commission Report) (1986)

CONFERENCES

The Scholar and the Feminist XI: Toward a Politics of Sexuality, Barnard College New York (1982)

Conference on Gender and Violent Crime against Women and Children, Cape Town (1999)

LEGISLATIVE REPORTS

Congressional Report No 536 98th Cong 2d Sess 1, United States of America (1984)

Congressional Report No 910 99th Cong 2d Sess 4 - 5, United States of America (1986)

OFFICIAL PUBLICATIONS

Government Gazette No 1308 of August 21, 1939 (South Africa)

Government Gazette No 1355 of September 8, 1949 (South Africa)

Government Gazette No 850 of July 10, 1964 (South Africa)

Government Gazette No 2973 of January 15, 1971 (South Africa)

Government Gazette No 3976 of July 13, 1973 (South Africa)

Government Gazette No 149 of January 30, 1976 (South Africa)

Government Gazette No 17560 of November 8, 1996 (South Africa)

Government Gazette No 19576 of December 4, 1998 (South Africa)

Government Gazette No 19611 of December 14, 1998 (South Africa)

Government Gazette No 20837 of February 4, 2000 (South Africa)

PARLIAMENTARY DEBATES

Hansard Parliamentary Debates Vol 146, United Kingdom (1857)

Hansard House of Commons Vol 494, United Kingdom (1857)

Hansard House of Assembly Vol 2782, South Africa (September 1974)

Hansard House of Commons, Canada (April 1985)

Hansard House of Commons, Canada (October 1985)

Hansard House of Commons, Canada (January 1986)

Hansard House of Commons, Canada (June 1986)

Hansard House of Commons, Canada (October 1986)

RESEARCH GROUPS

Wood K and Jewkes R "'Love is a dangerous thing': micro-dynamics of violence in sexual relationships of young people in Umtata" *CERSA (Women's Health) Medical Research Council, South Africa (1998)*

Jewkes R et al "'He must give me money, he mustn't beat me': Violence against women in three South African Provinces" *CERSA (Women's Health) Medical Research Council, South Africa (1999)*

Abrahams N et al "'I do not believe in democracy in the home': Men's relationships with and abuse of women" *CERSA (Women's Health) Medical Research Council, South Africa (1999)*

TASK FORCES / GROUPS

The Metropolitan Toronto Task Force on Public Violence against Women and Children, Canada (1984)

City of Minneapolis: Task Force on Pornography, United States of America (1984)

South African Institute of Race Relations, South Africa (1980)

Task Group on Film and Publication Control, South Africa (1994)

Media Institute of Southern Africa, South Africa (1995)

WORKING GROUPS

Toronto Area Caucus of Women and the Law, Canada (1984)

Canadian Advisory Council on the Status of Women, Canada (1986)

Proposals for Action by Attorney Generals to Promote Gender Equality in the Canadian Justice System The Federal, Provincial and Territorial Working Group of Attorney Generals on Gender Equality in the Canadian Justice System, Canada (1992)

NEWSPAPER / MEDIA REPORTS AND MAGAZINES

(in chronological order)

Untitled Newspaper Reports

March 4, 1970 *The Rand Daily Mail*
March 8, 1970 *Dagbreek*
January 20, 1971 *The Star*
January 27, 1971 *The Cape Argus*
February 24, 1971 *The Star*
February 25, 1971 *Die Oosterlig*
March 5, 1971 *Natal Witness*
April 1, 1971 *The Cape Argus*
April 25, 1971 *The Star*
April 27, 1971 *Die Vaderland*
May 5, 1975 *Die Volksblad*
May 5, 1976 *Die Burger*
August 17, 1994 *Windhoek Advertiser*

Magazines

April 1973, *Playboy Magazine*
December 1975, *Playboy Magazine*
March 1977, *Cherry Blossom Magazine*
June 1977, *Penthouse Magazine*
June 1978, *Hustler Magazine*
February 1983, *Hustler Magazine*
June 1983, *Take That Bitch*

March 1984, *Swank Magazine*

June 1990, *Hustler Magazine*

August 1990, *Simone Devon Magazine*

Titled Newspaper / Media Reports

Neville "Has the First Amendment met its Match?" March 6, 1977 *New York Times*

Dworkin R "The Coming Battles over Free Speech" June 11, 1992 *The New York Review of Books*

Vera V "Censored Artist, Activist Speaks Out" November 30, 1992 *Michigan Daily*

Nerenberg A "Fear Not, Brave Canadian: Customs Stand on Guard for Thee" January 22, 1993 *Montreal Gazette*

Dworkin R "Women and Pornography" October 21, 1993 *The New York Review of Books*

Tierney J "Pornography, the Low-Slung Engine of Progress" January 9, 1994 *New York Times*

MacKinnon CA and Dworkin R "Pornography: An Exchange" March 3, 1994 *The New York Review of Books*

MacCormick N "Names can hurt people" June 3, 1994 *Times Literary Supplement*

Wolke JR "Porn Broker: A Publicly Held Firm Turns X-Rated Videos into a Hot Business" July 11, 1994 *Wall Street Journal*

Fedler J "Pyrrhic victory over porn" April 21, 1996 *The Sunday Times*

Fedler J "Promises galore, but women still suffer" August 10, 1997 *The Sunday Times*

Oppelt F "Where women still live in fear of those they love" September 26, 1999 *The Sunday Times*

Braid L "Al meer kinders slagoffers van misdaad" September, 29 1999 *Die Burger*

Jordaan W "Misdadigers teen vrou, kinders 'moet swaarste strawwe kry'" September 29, 1999 *Die Burger*

Coetzee H "Mbeki val SAPD skerp aan - 'Onbevestigde verkragtingsyfer' wêreld ingestuur" October 29, 1999 *Die Burger*

Booyens B "Filmraad kyk hygflieks tien maal vinniger om by te bly" May 23, 2000 *Die Burger*

Van der Westhuizen T "Syfers oor geweld teen vroue skok" November 25, 2000 *Die Burger*

Sukhraj P "Muslims, Jews in court battle over 'hate speech'" December 3, 2000 *The Sunday Times*